Supreme Court, U.S.
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No. _____

In the

United States Supreme Court

LUIS A. SUAREZ,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE, Employer; AMERICAN POSTAL WORKERS UNION, Caribbean, Area Local 1070.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, a Viet Nam veteran preference eligible who served well his Country, working for the USPS prevailed in an arbitration hearing under APWU-USPS CBA provisions that arbitrator's decision is final and binding. APWU nor USPS appealed the award timely. USPS failed and refused to comply. Despites several complaints to APWU and that Petitioner's counsel requested to APWU to join the petitioner in an enforcement suit, APWU ignored petitioner's complaints and counsel's request waiving its statutory duty. Petitioner suit both under Sec. 301 to enforce the award and the Back Pay Act. A year after above proceeding was filed, USPS raised a defense that its failure is a new grievance, that Petitioner failed to exhaust administrative remedies, and that he did not asked APWU to enforce his award. District Court set aside the arbitral award holding that Petitioner failed to exhaust administrative remedies. Appellate Circuit affirmed holding that Petitioner did not asked APWU to enforce his award. Both courts ignored Petitioner Back Pay Act claim.

1- Whether under the circumstances of this case, despite the APWU-USPS CBA, this Court's precedent, federal labor law, and the liberal federal policy favoring arbitration agreements the arbitral award is grievable ?

2- Whether under the circumstances of this case, petitioner must prove beyond reasonable doubt that he asked the APWU to enforce his arbitral award?

3- Whether under the circumstances of this case, Puerto Rico District Court is empowered and bound to enforce an Act of Congress like the Back Pay Act under PRA, 39 USC 101 et seq.?

4- Whether Respondents are liable for damages in a Sec. 301 action to enforce arbitration award under this case, despite this Court's precedents and the relevant law?

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OPINION BELOW

The Opinion of the Court of Appeals (Pet. App.1a-11a) is unreported. Petition for rehearing or rehearing En Banc denied is unreported (Pet.App.7a-9a). The Judgment and Opinion of the District Court is reported at Suarez v. U.S. Postal Service, 178 F. Supp. 2d 69 70 (D.P.R. 2001). (Pet. App. 13a-17a).

STATEMENT OF JURISDICTION

The judgment of the Puerto Rico District Court was entered on December 14, 2001. Notice of appeal entered on February 7, 2002. The judgment of the Court of Appeals was entered on June 27, 2003. A petition for Rehearing and Rehearing En Banc was denied on October 14, 2003. A "Petition for Writ of Certiorari extension of time-to-file" up-to March 12, 2004 was filed on December 30, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and under Supreme Court Rule 10(c) (in that the 1st Circuit has decided an important question of federal law that has not been, but should be, settled by this Court).

STATEMENT OF THE CASE

The crux of this case has been the obstinacy of the Defendant USPS to circumvent the law with impunity in order to avoid their legal obligations to comply fully pursuant to the terms of the "A.A. of November 26, 1997". To do this the USPS has relied on delaying tactics, raising defenses "time-barred and raising new issues post-award as pretext to clog the record and harass Petitioner to derail his case. To that effect Defendant's facts presented are false, misleading and made with disparaging intent and untruthfulness.

Petitioner is a veteran preference eligible working for the U.S. Postal Service (USPS) and member of American Postal Workers Union (APWU) who was removed illegally from his duly appointed position effective on March 31, 1997. An

arbitration hearing held under APWU-USPS CBA provision that arbitrator's decision is final and binding rendered an Arbitral Award (A.A.) in Union's favor on October, 24 1997 to be effective on November 26, 1997. FN (See Copy of A.A., Exhibit A, Docket # 20 at 4. The USPS failed and refused to comply with its full terms. When Petitioner was Letter Carrier he was a Full-Time employee transferred to Postal Clerk. On November 26, 1997 (Date of A.A.) USPS took away his Seniority when transferred him as Part-Time Letter Carrier instead. USPS breached the A.A. which asked for Reinstatement with FULL SENIORITY. See Docket # 20 at 4, paragraph 14, (a recount of all the facts of USPS conduct which breached the CBA and the A.A.). Neither the APWU nor USPS appealed the award timely. Despites several Petitioner's complaints through several letters (the most relevant of this letters are found in Pet. App. 29a herein) and that *"Petitioner's counsel on behalf of petitioner and on his request, requested APWU to join the Petitioner in an enforcement suit to compel compliance, APWU ignored Petitioner's request.*" Petitioner implicitly asked Union through the complaints letters to enforce the award. This Letters are found in Docket # 33 "Plaintiff Statement of the Facts...", Exhibits 1, attachments 1-9 thereto.

At all time material Petitioner kept the Union informed of all the actions of omission or taken by USPS against the A.A. Over this matter Petitioner cite facts properly presented in record, Docket # 15, 19, 20, 33, and 38.

APWU ignored and refused petitioner's complaints and counsel's request. APWU failed to take action on plaintiff's behalf to enforce the lawful arbitration award and handled in a careless and perfunctory manner. By this conduct the APWU waived its duty of fair representation. **Bowen**, supra. Under these circumstances Petitioner suit both, to enforce the award, for damages, and to enforce the Back Pay Act, 5 USC 5596. See Docket # 20.

Six month after Petitioner had bein diligently prosecuting full compliance, Petitioner filed suit to compel compliance. USPS raised a time-barred defense arguing that its refusal and non-compliance with arbitral award is a new grievance and that Petitioner failed to exhaust his administrative remedies Defenses stemming from USPS wrong doing post-award and made over one year after Petitioner had filed suit and over one and half year after November 26, 1997, date of compliance accrued. USPS alleged that petitioner did not asked APWU to enforce the award. (Docket # 47 and 57). Petitioner alleged throughout the record that under federal labor law, the liberal federal policy, and this Court's precedent all defenses are time barred that issue preclusion doctrine apply (citing **International Union of Operating Engineers, Local No. 841 v. Murphy Company**, No. 95-2608, (7th Cir. 1996 to support his contention of preclusion doctrine); that APWU has an statutory obligation (citing **Foust**, supra and **Bowen**, supra) and that Petitioner asked the Union to enforce the award implicitly (inferred from his letters of complaints to APWU) and through his counsel (Docket # 38 at 4); that no exhaustion is required (citing **Clayton**, supra and **Locals 2222**, supra., **Colon-Velez**, supra and others) that the award must be enforced (relying on **Brooklyn**, supra., citing **Northwest Airlines, Inc. v. Air Lines Pilots Assoc**., 808 F.2d 76, 78 (D.C. Cir 1987). The D.C. Circuit Court held:

> *"Generally a labor arbitration award must be enforce if the arbitrator acts within his jurisdiction and his award draws "its essence from the parties collective bargaining agreement.").*

Also, that he is entitled to recover under the Back Pay Act because he is a veteran preference eligible entitled to an arbitral award within the meaning of the Act.

District Court set aside the arbitral award of November 26, 1997 and denied petitioner's claim for enforcement and granted judgment in USPS's favor holding its contention. District Court denied Petitioner his entitlement to the Act of Congress holding that Petitioner did not had a right to the Back Pay Act because his grievance was not granted by the Merit System Protection Board but from an Arbitrator. See Copy of 5USC5596 in Pet. App., page 24a .

First Circuit Court affirmed and denied Petitioner's appeal upholding USPS's contention. Also, denied Petitioner's request for Rehearing or Rehearing En Banc. Both Courts failed to resolve Petitioner's Back Pay Act, Congress Mandate. In this regard Justice has not been served because Petitioner yet is entitled to his statutory A. A. and the benefits under the Back Pay Act.

PRE- ARGUMENT STATEMENT

Vol. I (Dockets No.13, 15, 19, and 20) and Vol. II (33, 38, 41, and 53) are incorporated by reference and re-alleged herein. See copy of Docket # 33 in Pet. App. at 42a, Docket # 41 in Pet. App. at 20a, and Docket # 53 in Pet. App. at 49a Petitioner Appeal Brief to First Circuit Appeal and Petition for Rehearing or Rehearing En Banc herein are incorporated by reference and re-alleged herein.

Petitioner was diligently reporting, enquiring, and complaining in writing to APWU the refusal and failure of USPS to comply fully with the terms of the A.A. This vias confirmed by the Defendant APWU's own contentions throughout this proceeding (will discuss them below) also was confirmed by the Arbitrator Joseph Cannavo, Jr., in his A.A. of May 7, 1999. (See Exhibit C at Circuit Appeal's, Supp. App. at last page or APWU Appeal's Supp. Exerpts at SER 1). The APWU's contention has been that grievance 98-298 and the hearing of February 11, 1999 was to enforce the A.A., unnecessary once the USPS comply fully with the

A.A. While the facts in record shows that USPS intentions was to circumvent the A.A. legal obligation by asking Petitioner to sign Form 8039 in blank. Petitioner assert that grievance 98-298 is inconsistent with this Court's decision in Clayton, supra. The Arbitrator's Opinion does confirm Petitioner's contention that USPS failed to comply with his Award of November 26, 1997. See Opinion and Award of May 7, 1999 Petitioner's Circuit Court appeal, Supp. App., Exhibit C at 45 (last doc.).

Held:

> *"The fact that the Postal Service assigned him as a PTF in the carrier craft pursuant to this Arbitrator's award is a further indication of its failure to deal with the Grievant in a forth right manner and in compliance with the intent and spirit of the Arbitrator's award."*

ARGUMENT

I- Whether under the circumstances of this case, and despite the APWU-USPS CBA, this Court's precedent, federal labor law, and the liberal federal policy favoring arbitration agreements, the arbitral award is grievable ?

In Docket # 33 Petitioner relied on this Court's decision in **Clayton v. Automobile Workers**, 451 U.S. 679 (1981) to support his contention that Petitioner is not Required to Exhaust Administrative Remedies. See Relevant Provisions Involved citation at Pet. App. at 42a. The Opinion Below is not supported and in direct conflict with this Court's decision in Clayton.

This Court held in Clayton::

> *"The policy underlying 301 to effect a relatively rapid disposition of labor disputes would be undermined by an exhaustion requirement unless the internal*

procedures are capable of either reactivating the employee's grievance or of redressing it. Pp. 689-693."

"We hold that where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his 301 suit, exhaustion will not be required with respect to either the suit against the employer or the suit against the union. "

This Court's decision is squarely confirmed in the instant case. The Union, after date of A.A. of November 26, 1997 lost time in filing grievance 98-298 which was arbitrated on February 11, 1999 almost 3 month after November 26, 1998 due date to file suit under Sec. 301 in Puerto Rico. See Petitioner allegation in Docket # 33 Pet. App. at 43a. Under these circumstances Petitioner was compelled by Defendant's wrong doing and breach of CBA, Art. 15 and the A.A. If Petitioner did not file this suit to compel compliance he would has lost his rights and entitlements granted by the Arbitrator. For this reason the Union acted arbitrarily and processed the A.A. in a perfunctory fashion.

The Opinion Below is based on flawed statements like *"Suarez challenges the method used by USPS to calculate the back pay awarded" "Petitioner's only request is the insufficient payment made to him"* two years after he filed this proceeding for enforcement and that *"this is a new grievance within the meaning of the CBA"*. The CBA, Article 15 states: *"Arbitrator's decision is final and binding on the parties"* Because there is no provision in the four cornes of the CBA which support such statement the award is not grievable under the CBA and inconsistent with existing law. (See copy of CBA, Art. 15 at Pet. App. at 27a). In Docket # 33 at 4 Petitioner relied on **Locals 2222, 2320, 377 et al., v. New England, Etc.**, 628 F2d 644, at page 649

(1st Cir 1980). This First Circuit citation backs Petitioner's contention:

> *"To require the Union to invoke the time consuming and burdensome grievance procedure again in order that the parties might resolve the remnants of a dispute which has already once traveled that route would seriously undermine the chief policies underlying resort to those procedures in the first instance: the speedy, flexible and inexpensive resolution of labor disputes".*

Above First Circuit decision does not support the Opinion Below therefore contradicting itself. In Docket # 15 at 4 Petitioner relied on **Professional Administrators, Ltd v. Kopper Glo Fuel Inc**., 819 F. 2d 639, at 642 (6th Cir. 1984), the Court held:

> *"Arbitration is meant to be a quick and final resolution by which parties are bound".*

The District Court set aside Arbitral Award of Nov. 26, 1997 by simple saying that Petitioner's only request is the insufficient payment made to him 1 year and ½ after he filed this proceeding for enforcement on July 23, 1998. The District Court's statement is unreasonable and misplaced. Such statement is made and based on a breach of the award by the Defendants made one and half year later in a time barred defense.

ELM is not Applicable To a Case under Postal Clerk CBA Regarding Wages, Hours and Other Terms and Conditions of Employment.

It's presumed that both the Union and USPS were fully aware that the Postal Clerk CBA authority flows down

directly from the NLRA. not from USPS regulations. Petitioner has been claiming Defendant's breach of the CBA by its conduct. CBA, Article # 5, states:

> *"PROHIBITION OF UNILATERAL ACTION*
> *The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law."*

Petitioner has been contending that the USPS breach the CBA by Applying ELM Sec. 436 to Petitioner's A.A. According to Art. 5 the Arbitral Award is governed by the NLRA and NLRB's case law not by USPS regulations.
The First Circuit is also relying on non facts and on the **Miller v. U.S. Postal Serv.**, 985 F. 2d 9, 10 (lst Cir. 1993) case which does not apply in this case. The propriety and applicability is wrong because APWU-USPS CBA does not support to be modified or to incorporate any proposed without a proper National Level Arbitration procedures been followed. (See Bargaining Unit Postal Clerk CBA, Art. 19 at Pet. App. 28a and PRA, 39 USC 1207(a)(1)). Miller case decision was based on the Bargaining Unit of the Letter Carrier which does not apply to Postal Clerk Bargaining Unit. Any application of ELM Sec. 436 related to wages, hours, and conditions of employment is governed by NLRA and NLRB case law. Applying ELM Sec. 436 to an Arbitral Award is a breached of the APWU-USPS CBA.

The holding of the First Circuit Appeal Court is particularly flawed because is based on non facts, misleading information and time-barred defenses. It also failed to consider either the federal strong policy favoring peaceful settlement of labor disputes through arbitration, the Federal Labor Law, this Court's precedents in Clayton, Foust,

Bowen, and others, and its own precedents in Locals 2222, Colon-Velez. The Opinion Below is seriously harmful to the Puerto Rico (P.R.) State Court law of the land in matters of an A.A. **J.R.T. v. Union de Tronquistas, Local 901**, 117 D.P.R. 790 (1986) which relied on Bowen's case. This case has become the law of the land regarding an arbitral award granted in Puerto Rico therefore harmful to the P.R. labor policy and its case law jurisprudence because is contradiction to it. The decision in J.R.T., supra. relies on this Court's decision in Bowen v. USPS and is the same ruling as in federal court of Lofton v. US Postal Service cited in Docket # 33.

II- The Opinion Below holding that Petitioner did not asked Union to enforce his award is a reversible error of law for several reasons.

One good reason:

In Docket # 33 at 6, Petitioner relied on APWU, **Brooklyn Local v. US Postal Service**, 80 C 1974, (E. D. N. Y. March 29,1989) citing **Northwest Airlines, Inc. v. Air Lines Pilots Assoc**., 808 F.2d 76, 78 (D.C. Cir 1987). The D.C. Circuit Court held:

> "Generally a labor arbitration award must be enforce if the arbitrator acts within his jurisdiction and his award draws "its essence from the parties collective bargaining agreement."

Petitioner Express and Implied Request to Enforce the A.A. by Letters to Union And USPS

An implied-in-fact request for enforcement exist by inference from the facts of the Petitioner's letters and Defendant Union's own statements of the facts and contentions. Defendant's statement alone would be enough genuine and convincing evidence of material facts that Petitioner did in fact asked the Union to enforce his A.A.

Petitioner was sending Defendants letters complaining and discussing the cases of Union enforcement in court of Pittsburgh and Brooklyn cases. (See copy of the four most relevant Letters at Pet. App. at 30a.) The cases of Pittsburgh and Brooklyn were discussed by Petitioner with APWU NBA Carlos Rodriguez, Petitioner commented to him that this is the procedures the Union should follow. Mr. Rodriguez answered that "Union had no resources". The Pittsburgh and Brooklyn cases appeared in APWU newspaper "The American Postal Worker" in an article published Aug. 1997 by Industrial Relation Director Mr. Greg Bell who requested *"all local unions to send to his office all cases of arbitral award where the USPS refused to comply, that his office will enforce them in court"*. Union's answer was to file a grievance because Union did not have resources. In Docket # 38 at 13, paragraph 35 Union in the following statement asserted again that Petitioner was diligently seeking help from the Union regarding enforcement of his A.A. Union asserted that:

> *"Petitioner informed and requested the Union to assist him on his back pay claim. The Union explained him of its limited resources to carryout that kind of duty. Therefore Suarez proceed himself to make the claim, which is done by filling out blank forms."*

Petitioner has been asserting throughout this proceeding that he was diligently requiring intervention of the Union throughout writing letters reporting, complaining, and

discussing possible enforcement proceeding. When he did so, Petitioner made an "Implied Request" to Union to enforce his A.A. Petitioner not only did asked implicitly the Union to enforce his arbitral award in several letters since Nov. 26, 1997 up to July 23, 1998 but also in Docket # 33, Petitioner Exhibit 3, at 37 copy of Deposition of May 26, 1999, at 17 of 44 Petitioner answered two times that he asked the Union "to enforce his award" (he assert he did not asked to file a case, because he never used the word "case" neither a grievance). Petitioner testified as follows:

"Q Did you request the Union to file a grievance?
A No, I never told them to file a grievance for back pay.
Q Fine. You asked the Union to file a grievance , or take any steps to enforce your award.?
A To enforce the back pay, the award, yes.
Q The award, the arbitration?
A To enforce the back pay."
Q Ok, I understood you know. I ask the same question, did you ask the Union to file a case to enforce the award, yes or no?
A No, to...no."

Also see Docket # 33, "Petitioner Answers to Defendant Union Interrogatories", Exhibit 1, where Petitioner recounts all his diligently efforts he made in prosecuting his rights under the A.A. This testimony is extensive and clearly asserted Petitioner was asking Union to enforce his A.A. which constitute an express request and an implied request.

An Implied-in-Fact and Implied-in-Law Request for Enforcement

Implied-In-Fact Understood through circumstances or conduct though not communicated in words. Petitioner diligently enquiring with Union would be enough to demonstrate he asked the Union to enforce his A.A.

Implied-in-Law Denotes a contract imposed by law, regardless of the intention of the parties, in order to prevent unjust enrichment. Petitioner is a member of the Union with a contract and paying proper fees. Even if he did not ask Union, because Union has an statutory duty of fair representation, union is bound by law to move and oppose the violations of the CBA in members behalf as agent of the members. See **Foust**, supra. and **Bowen**, supra.

An example follows:

An implied-in-law contract for payment exists when a doctor gives emergency treatment to an unconscious accident victim although the injured party did nothing to solicit the doctor's help.

This Court in Foust, supra held:

> *"The fair representation doctrine thus serves [442 U.S. 42, 47] as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, supra, at 182. Under the doctrine, a union must represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements."*

Under the doctrine of fair representation Union is bound to comply with its duty by law, is legally obligated. By not taken an action to enforce a meritorious grievance and its favorable arbitral award the Union waived this duty, relinquished it to Petitioner under this Courts decision in **Bowen**, supra.

This Court in Bowen held:

> *"(c) When the union, as the employee's exclusive agent, waives arbitration or fails to seek review of an*

adverse decision, the employer should be in substantially the same position as if the employee had had the right to act on his own behalf and had done so."

Under this Court's decision alone the Opinion Below failed and must be reversed. The First Circuit erred.

Defendant Union's Contention Evidences Petitioner did the Asked Union to Enforce his A.A.

In Docket #38 at 10, paragraph 20 Union alleged that: *"Due to the USPS refusal to comply with the before mentioned award, APWU filed grievance to the CBA in order to make effective said award. Said action was requested by Suarez."*

Also while in Docket # 38 at 13, paragraph 35 the Defendant Union asserts that:

"Petitioner informed and requested the Union to assist him on his back pay claim. The Union explained him of its limited resources to carryout that kind of duty. Therefore Suarez proceed himself to make the claim, ..."

In the first citation above the defendant Union's statement is a confirmation of Petitioner's citation of answers he gave in Deposition mentioned above where he answered two times that he asked the Union "to enforce his arbitral award"

By the language in this two Union's allegations alone any fact finder would conclude that this was a clear waiving of Union's duty and relinquished it to Petitioner. Also, the fact that Petitioner did in fact asked the Union "to make effective said award" *"Petitioner informed and requested the Union to assist him on his back pay claim"*. One very important fact in

these allegations is that the Union made a clear statement that Petitioner did not asked the Union to file a grievance to enforce the award neither he asked to just file a "case" but Petitioner was asking the Union to enforce it. (See Suarez's Sworn Statement in Docket# 53 with copies of letters making Union aware that USPS refused to comply). The answer of the Union was that they did not have resources to do that claim in court. They refused to enforce the award and instructed and authorized Petitioner to do it himself several times. So, Petitioner proceed himself to claim his award in court.

Another testimonial evidence giving by defendant APWU is found in **"Brief of Appellees American Postal Workers Union to the Appellate Circuit"** at page 11, the Union asserted that:

> *"In light of Suarez's demands APWU requested the USPS to comply with the award. However, USPS sustained its refusal to comply. In view of that position APWU filed an additional grievance to enforce the Award granted on November 26, 1997."*

It is crystal clear that by the Defendant Union's own testimony, Petitioner asked the Union to take an action *"to make effective said award"* in court, not through a grievance. Neither, Petitioner asked the Union to file "a case" but he did asked to enforce his award. Petitioner having won an arbitral award that its totally favorable to him and knowing very well that because of the terms of Laches Doctrine and the case of Foust, supra (where an employee lost his award because Union failed to enforce it by 2 days) if Petitioner does not claim compliance with the Award within a time frame, because a common sense rule and this Court's decision in Clayton supra and Foust, supra it is crystal clear that he would loose his rights to his award . If USPS refused and failed to comply with an award, how and on what authority

would a second award will force compliance with the first one? This is irrational and would be an endless process. This Court's decision in Clayton explain fully why an award can not be enforce with another grievance. Accordingly, this Court established that by the time the grievance would be resolved, the result will not reactivate his rights to the Award as a matter of law. But, Union insisted saying they did not have resources to file suit in court. The Union's allegation clearly confirm that Suarez was diligently seeking help from the Union, as they asserted "in order to make effective said arbitral award" (to enforce the award).

Also, Industrial Relations Director Mr. Greg Bell (one of his responsibilities is Compliance with Arbitration Award) in Union's newspaper mentioned above dated August 1997, Article titled "Court Decisions Thwart USPS Denial of Back Pay" gave to all local Local Unions the following instructions in article's section titled:

> *"Non-compliance Complaints*
>
> *Cases where management has denied arbitration-ordered back pay because they feel employee-provided information indicates that the employee has not made reasonable efforts to obtain other employment should be sent to my office. We will review these cases for further action and enforcement."*

Accordingly APWU Local 1070's excuse and defense of no resources is a sham. Petitioner asserted that, here, the APWU failed to diligently enforce the back pay award. The defense by defendant union that it "had no resources" is a sham. How could it then invoke a more costly procedure of a second arbitration ? Nor does it explain why it did not seek assistance from its national office.).

Petitioner's actual and Express request to enforce the A.A.

Petitioner assert that in Docket # 38 at 4, Harold Hopkins former Counsel for the Record stated that:

> *"In July 1998, Petitioner reiterates his request for back pay. Petitioner advises both APWU and USPS in writing. In August 1998, at Petitioner's request, my attorney, Harold Hopkins, visited the Defendant APWU to request that the Defendant APWU file a suit to enforce the back pay award and offered to assist Defendant APWU with this matter. Defendant APWU did not advise Petitioner of its decision and Petitioner proceeded to amend its complaint to include APWU as a defendant."*

Petitioner was compelled and had no recourse but to entertain this enforcement action against both APWU and USPS. In Docket # 38 at 2, Petitioner asserted that:

> *"This action lies due to the Union's failure to provide fair representation by its perfunctory, careless, reckless and negligent in handling Petitioner's claims and by its failure to prosecute the Petitioner's favorable arbitration award." (Emphasis added). Also, in Docket # 20 "Second Amended Complaint". APWU, P.R. Local 1070 waived its duty of fair representation by arbitrary refusing with the excuse of no having resources. Union ignored Petitioner's offer to join him while he covers the expenses and failed to enforce the award and breached the CBA by handling Petitioner's meritorious award in a " perfunctory, careless, reckless fashion".*

The question of when Union Breaches its duty of fair representation has been long ago answered and gave an example. This Court in Foust held:

> "In particular, a union breaches its duty when its conduct is "arbitrary, discriminatory, or in bad faith," as, for example, when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion." Vaca v. Sipes, supra, at 190, 191. " **FOUST,** supra.

Definition of The Statutory Duty of Fair Representation.

Puerto Rico State Court of last resort's definition of duty of fair representation over an award granted in Puerto Rico is giving in **J.R.T. v. Union de Tronquistas, Local 901**, 117 D.P.R. 790 . State Court held:

> *"After arbitration award was confirmed, during two months, Union dialoged with Employer, even when Employer was not complying. After the Board refused to put into effect the award, the Union waited 3 months for reconsideration, which was denied. The duty of the Union was not only to obtain a favorable result for its members, but also, diligently and vigorously convert it into reality. The record sustains the decision of the Board, which imposes 50% of amounts owed to Union.(5) "*
>
> *"Fn 5. The Union complained about the amount of liability that the Board imposed to it. At the light of Bowen v. US Postal Sevice, 459 U.S. 212 (1983), we see no merit in such contention."*

This is the **"Law of the Land"** in the matter of an Arbitral Award granted in Puerto Rico relying in this Court's decision in **Bowen**, supra.

The State Court holding ante is consistent with the holding in federal court we cited in **Lofton**, supra. We cited Lofton in docket # 15, 19, 33, and 38). **Lofton**, supra held:

> *"The Court in F.W. Woolworth, 629 F.2d 1204, at 1211 defined the Union's duty of fair representation. The duty requires a Union to take meritorious disputes to arbitration and defend favorable arbitration decisions in Court." Lofton v. U.S. Postal Service, 592 F. Supp. 36 at 38-39 (1984)."*

Lofton intention was to overturn an unfavorable award while this case is to uphold a favorable and meritorious award.

III-Whether under the circumstances of this case, Puerto Rico District Court is empowered and bound to enforce an Act of Congress like the Back Pay Act under PRA, 39 USC 101 et seq. ?"

Petitioner's Back Pay Award is Not Governed by ELM Section 436

In Docket # 13 Petitioner cited the Opinion of **Davis, et al v. USPS and OPM** intervenor, and **cases cited therein** in support of Petitioner's contention that as veteran preference eligible in the USPS and a prevailing party in an arbitration hearing, which granted an A.A. in his favor, he is entitled by Congress Mandate to recover and to be made whole under the Back Pay Act of 1966, 5 USC 5596 et seq. pursuant to 39 USC 1005 (a) (1). See Dockets # 13, 15, 19, 20, 33, and 53. See copies of 33 and 53 at Pet.App. at 42a.
Cases supporting Petitioner contention are:
1-**Davis, Yokley, Green,** MSPB Dockets DA0752880436-X-1, SL0752880286-X-1[1] DA0752880424-X-1, and

OPM Intervenor, Oct 17, 1994.

2-**Andress v. U. S. Postal Service**, 56 M.S.P.R. 501 (1993)

3-**Power v. United States**, 597 F.2d 258, 264 (Ct. Cl. 1979), cert. denied, 444 U.S. 1044 (1980)

4-**White v. Bloomberg**, 501 F.2d 1379, 1381 n.1 (4th Cir. 1974)

5-**Urbina v. United States**, 428 F.2d 1280, 1287 (Ct. Cl. 1970).

Petitioner has being asserting that Back Pay Act jurisdiction in D.C. is fully explained by **White v. Bloomberg**, 501 F.2d 1379, 1381 n.1 (4thCir. 1974).

In PRE-TRIAL ORDER, Docket # 38 at 28, Petitioner assert that the issue of the veteran's preference eligible employee's not needing to mitigate the back pay award has been upheld. See **Davis, Yokley and Green**, and **cases cited therein. In support of the Back Pay Act issue, Petitioner cited White v. Bloomberg (USPS), for his contention that statute Postal Re-organizational Act, 39 USC 101 et seq. grant District Court original jurisdiction and authority to enforce the Back Pay Act.**

In Docket # 53 petitioner asserted that:

There are a series of cases issued by the Merit System Protection Board which have decided that the Back Pay Act, not ELM 436, is the governing method of effectuating compliance with back pay awards owed to a veteran preference eligible employee (such as Petitioner) of the Postal Service. See **Davis v. U.S. Postal Service and Office of Personnel Management**, 64 MSPR 652 (1994); also **Timberblake v. United States Postal Service**, 79 MSPR 520 (1998), **Green v. U S Postal Service**, 67 MSPR 62 (1995).

It should be noted that the Back Pay Act, 5 USC 5596,

"applies to any case in which back pay is due to unjustified personnel action, to an employee of an agency, who on timely appeal or an administrative decision (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of all part of the pay, allowances, or differentials of the employee-"

See copy in Pet. App. at 22a and copy attached to Docket # 53, Exhibit 1. The Merit System Protection Board has interpreted the Back Pay Act and its regulations as to affording all veteran preference eligible employees that their claims will be governed by the latter, not the ELM 436. See also Docket # 53 Exhibit #2, (5 CRF 550.801-808).

Payment of June 1999 almost two years after November 1997. Petitioner is owed proper reinstatement and additional back pay and interest because on November 1997 USPS removed Petitioner from his duly appointed position of Residual Vacancy Full-Time Regular Clerk since September 28, 1996. See Appeal Prayer for relief.

Petitioner has set forth in his **"Sworn Statement"** numerous reasons for which he has not been properly paid back pay or the interest thereon. Copy attached to Docket # 53 at Pet. App. at 49a. In this regard, the PS Form 8039 mandates the agency to use the Petitioner's last thirteen pay periods as the basis for payment of what is owed to him. But in Petitioner's case they used 28 pay periods instead tampering with their owns procedures. Petitioner was a PTF (Part Time Flexible Window Clerk) immediately prior to his unlawful discharge.However, the true overtime, which

Petitioner worked, of almost 12 hours daily does not appear in these computations nor does it included calculations for premium overtime nor night differential. Rather, Defendant U S Postal Service used the hours of another atypical employee, Juan Rodriguez, in lieu of using the prescribed method. The amount of back pay owed to Petitioner must be recalculated to reflect all his entitlements. Petitioner is unable to calculate the correct back pay since the defendant did not furnish him with copies of how it made the computations of his back pay.

The interest rates used by the defendant are also in error. First, the computation did not use the prescribed percentage rate under the Back Pay Act, which is the IRS rate prescribed in 26 U SC 6621 (a) (1). See Docket # 53, Exhibit #3. Rather, it used the Federal Judgment rate (See Docket # 53, Exhibit #4). Another discrepancy is that the interest was computed on a 28-day cycle rather than the statutory daily compounding of interest. This resulted in the Petitioner receiving less than 50% of what is owed in interest on his back pay. Pursuant to CBA he is entitled to a promotion on August 1999. Other items owed are holiday pay, annual and sick leave credits, all calculations are wrong because reinstatement and seniority were wrong. See **Gannon v. U S Postal Service**, 67 MSPR 660 (1995 also **Bradley v. U S Postal Service,** 79 MSPR 110 (1998).

In sum, it is necessary that an order issue ordering the Defendants to make whole Petitioner in accordance with his rights as for veteran preference eligible employee and that his back pay and interest be correctly calculated. The Agency should also be ordered to furnish its computations of both back pay and interest to the Petitioner in order for him to be able to ascertain the correctness of the same.

Petitioner Had No Duty To Mitigate Damages

The first reason for Petitioner not having to mitigate damages (back pay) is that the arbitration award was clear on its terms, it awarded "full back pay". This award was not appealed by the defendant U S Postal Service and it became final and binding on the agency. The arbitration award, provided, quote, "The grievant (Petitioner) *"shall be reinstated to the U S Postal Service with Full seniority and Full back pay, and All other benefits and Entitlements."* My emphasis. The award was clear on its terms. The U S Postal Service failed to raise any issues of mitigation of damages during the arbitration and it knew what was at stake, back pay and reinstatement to his former position. Yet the agency did not appeal this decision. The agency is now barred from doing so. See **International Union of Operating Engineers, Local No. 841 v. Murphy Company**, 95-2608, (7th Cir.1996).

Secondly, the parties are aware that a veteran's preference eligible employee such as Petitioner, is entitled to back pay as governed by the Back Pay Act of 1966 and not by the Postal Service regulations (ELM 436). Furthermore, Petitioner and other veteran preference eligible employees have no obligation to mitigate damages nor does he/she have a duty to seek alternate employment during the period he/she was illegally removed from his/her employment.

It is undisputed that Petitioner is a veteran preference eligible employee and the defendant, U S Postal Service, has recognized him as such. See Docket # 53 "Sworn Statement" of the Petitioner at paragraph 3. This was also established at the arbitration hearing. See Attachment A to Second Amended Complaint, at page 29. As a veteran preference eligible employee, during the appeal of his unlawful removal, Petitioner was not required by law to be employed elsewhere. See **Andress v. U S Postal Service**, 56 MSPR 501, at 505, 507-509. This stems from the Veteran's Preference Act of 1944, later amended by the Back Pay Act of 1966, as discussed in **Davis v. U S Postal Service**, supra.

Likewise, it is untrue that there was a windfall to Petitioner in the amount of $2221.63. This is incorrect. First of all, Petitioner had not duty to discount salaries earned while illegally removed from the Postal Service. This is because full back pay was awarded. The arbitrator did not award full back pay less interim earnings. There is a collateral estoppel to make this claim now. Secondly, as a preference eligible employee had no duty to work while appealing his illegal removal. This was decided by MSPB in numerous cases. Finally, the Petitioner incurred in expenses necessary to procure the employment. These expenses offset his earnings of $2221.63 . It has also been determined that unemployment benefits are not deductible from a back pay award. See **Margolin v. U.S.** 75 Ct. Cl. 768 (1966).

IV-Whether Respondents are liable for damages in a Sec. 301 action to enforce arbitration award under this case, this Court's precedents and the relevant law?

Petitioner's contention has been that Defendants are liable for Damages under Sec. 301 pursuant to **Bowen v. United States Postal Service,** 459 U S 212, (1983).

Petitioner is due damages, attorney fees from both Defendants for its failure to comply with its duties under law. It is apparent that the U S Postal Service officials acting on behalf of the agency acted in bad faith from at least July 20, 1998 forward. They stifled all attempts by Petitioner to obtain his back pay by:

(a) Requesting Petitioner to sign a blank check (Form PS 8039) in February 1998.

(b) Supplying Petitioner with an incomplete form PS 8039 about August 31, 1998 and giving him instructions to sign it in blank after he had requested the form be supplied with the

information indicated in the instructions thereon (See Attachment C to sworn statement of Petitioner).

(c) Not answering Petitioner's letter of October 17, 1998 (Attachment D).

(d) Not preparing back pay settlement sheet (PS Form 8039) until April 1999, some 9 months later, and even then, preparing it incorrectly (Attachment E).

(e) Not paying the back pay and interest owed to Petitioner under the law even in June 1999, nor making good faith efforts to correct its determinations since June 1999.

(f) By using the ELM 436 method of computing back pay in lieu of legal precedent and directives of the agency to use the Back Pay Act and its implementing regulation 5CFR 550.801-808 to compute back pay for Petitioner knowing the latter is a veteran preference eligible employee.

The agency argues that it owes no attorney fees to Petitioner. This is untrue. The Petitioner had to file this action due to the agency's refusal and reluctance to comply and also due to the fact that enforcement of the award would be time barred if he did not act within 6 months after the defendant labor union failed to duly represent him due to arbitrary, discriminatory, perfunctory and invidious reasons. It is a fact that the Petitioner did not get the cooperation from the Union, who suggested that Petitioner sign the "blank check" and told Petitioner that it did not have money to enforce the award. See Exhibits #3. Petitioner at least was lead to believe that the Union and the U S Postal Service were acting together regarding the non-payment of his back pay. See pages of deposition answers, pages 25 to 38, page 79. Exhibit # 5.

In any event, should there not be proven joint and several liability, there should be imposed liability on the U S Postal Service for attorney fees due to its bad faith acts and negligent handling of the back pay awarded to Petitioner. See **Bowen v. United States Postal Service**, 459 U S 212, supra **Vaca v. Sipes**, 386 U S 171 (1967). In Bowen, the court approved a splitting of this assessment by jury of the responsibility of each party.

Petitioner has not been compensated in accordance with the law, the Back Pay Act by Congress Mandate, and justice has not been served. Likewise, attorney fees and costs should accrue to Petitioner, who has been the victim of inaction by the labor union and by bad faith dealing and reluctance to comply by the U S Postal Service. Also, the Opinion Below must be reverse because First Appeal Court's holding is inconsistent with this Court's decisions, harmful to State Court's Law of the Land and its case law jurisprudence in the Commonwealth of Puerto Rico, also, contradicting it's own case law in **Locals 2222** , supra and **Colon-Velez**, supra.

Petitioner, made an Implied-in-Fact Request to Union to enforce his A.A.
Union testified:
"Due to the USPS refusal to comply with the before mentioned award, APWU filed grievance to the CBA in order to make effective said award. Said action was requested by Suarez." See Docket #38 at 10, paragraph 20.

"Petitioner informed and requested the Union to assist him on his back pay claim. The Union explained him of its limited resources to carryout that kind of duty. Therefore Suarez proceed himself to make the claim, ..." See Docket # 38 at 13, paragraph 35.

"In light of Suarez's demands APWU requested the USPS to comply with the award. However, USPS sustained its refusal to comply. In view of that position APWU filed an additional grievance to enforce the Award granted on November 26, 1997." See Brief of Appellees American Postal Workers Union to the Appellate Court at 11.

In Docket # 38 at 4 Petitioner asserted that:

"In July 1998, Plaintiff reiterates his request for back pay. Plaintiff advises both APWU and USPS in writing. In August 1998, at Plaintiffs request, my attorney, Harold Hopkins, visited the Defendant APWU to request that the Defendant APWU file a suit to enforce the back pay award and offered to assist Defendant APWU with this matter. Defendant APWU did not advise Plaintiff of its decision and Plaintiff proceeded to amend its complaint to included APWU as defendant." Docket # 38 at 4.

Petitioner has properly presented, that there is a genuine and convincing evidence of material facts that warrant the grant of Writ of Certiorari by this Court.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

Benito Gutierrez Diaz, Esq.
U.S.D.C. P.R. 113112; 1st Cir 66430
(Counsel of Record)
P.O. BOX 1329
Fajardo, Puerto Rico00738
Tel. (787) 860-5547
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Appendix

A- 1st Circuit Appeal Court Decision----------1a
B- Order Denying Rehearing and Rehearing En Banc---------- 7a
C- District Court Decision---------- 10a
D- District Court Ruling: Denying APWU 's Motion to Dismiss and Summary Judgment, Docket#41---------- 20a
E- Relevant Provisions Involved----------22a
F- Petitioner's Letters of Complaints of USPS' s refusal and non-compliance.
1- January 9, 1998 to APWU Complaint of USPS non-compliance----------30a
2- January 22, 1998 to USPS Complaint of non-compliance ----------36a
3- February 2, 1998 to USPS Discussing legal enforcement action ---------- 38a
4- February 17, 1998 to USPS Discussing legal enforcement action ----------39a
G- Docket # 33---------- 42a
H- Docket # 53---------- 49a

APPENDIX

A- 1ST Circuit Appeal Court Decision.

Judgment:
"The judgment of the district court is affirmed."

Held:
" Here, Suarez did not ask the Union to seek enforcement of the arbitration awards; no rational fact finder could find that the Union acted irrationally or in bad faith."

United States Court of Appeals
For the First Circuit

No. 02-1261
LUIS A. SUAREZ
Plaintiff-Appellant

v.

UNITED STATES POSTAL SERVICE, Employer; AMERICAN POSTAL WORKERS UNION, Caribbean, Area Local, d/b/a P/P area Local 1070; UNITED STATES; WILLIAM J. HENDERSON; Postmaster General, as representative of United States Postal Service
Defendants-Appellees

MIGDALIA DELL'ANNO, Supervisor; JUAN J. TORRES, Officer in Charge; BEDA VELAZQUEZ-OLIVENCIA, Labor Relations Specialist
Defendants

JUDGMENT

Entered: June 27, 2003

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:

"S/ RICHARD CUSHING DONOVAN "
Richard Cushing Donovan, Clerk

[cc: Messrs.Gutierrez-Diaz, Boardman and Luciano-Delgado]

Not For Publication in West's Federal Reporter
Citation Limited Pursuant to 1st Cir. Loc. R. 32.3

United States Court of Appeals
For the First Circuit

No. 02-1261

LUIS A. SUAREZ,
Plaintiff, Appellant,

v.

UNITED STATES POSTAL SERVICE, Employer; AMERICAN POSTAL WORKERS UNION, Caribbean Area Local, d/b/a/ P/P area Local 1070; UNITED STATES; WILLIAM J.HENDERSON, Postmaster General, as representative of United States Postal Service,
Defendants, Appellees,
MIGDALIA DELL'ANNO, Supervisor; JUAN J. TORRES, Officer inCharge; BEDA VELAZQUEZ-OLIVENCIA, Labor Relations Specialist,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jay A. Garcia-Gregory, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lipez, Circuit Judge.

Benito Gutierrez-Diaz, for appellant. Stephan J. Boardman, with whom Eric J. Scharf, Humberto S. Garcia, United States Attorney, and Fidel A. Sevillano-Del Rio, Assistant United States Attorney, were on brief, for appellees United States Postal Service, John E. Potter and United States.

Arturo Luciano-Delgado, for appellee American Postal Workers Union.

June 27, 2003

TORRUELLA, Circuit Judge. **Luis A. Suarez has been an employee of the United States Postal Service ("USPS") since 1986. In late 1995, he was placed in a window clerk position, contingent upon successful completion of a qualifying examination. He did not pass the examination and was terminated in March, 1997. Represented by the American Postal Workers Union ("Union"), Suarez filed a grievance. The Union pursued the matter to arbitration, where an arbitrator found that Suarez's removal violated the collective bargaining agreement ("CBA"). The arbitrator held:**

> The Grievant shall be reinstated to the Postal **Service with full seniority and with full back** pay and all other benefits and entitlements. The Arbitrator directs the Postal Service to reassign the Grievant to a position for which he has the qualifications to perform the work either in the clerk craft or in the carrier craft.

After his reinstatement, the USPS asked Suarez to complete the forms necessary to process his back pay. Suarez delayed completion of these forms until July, 1998 because he was concerned that the USPS would offset his interim earnings. He eventually submitted the forms, and in June 1999, the USPS paid Suarez $32,331 in back pay, without any offset for interim earnings, and approximately $2,665 in interest. Suarez filed another grievance regarding the position to which he was reinstated, and again prevailed. The arbitrator ordered the USPS to provide Suarez window clerk training, and Suarez was eventually made a window clerk. Suarez filed suit in district court in July, 1998, claiming that the back pay amount was improperly computed and that the Union breached its duty of fair representation to him.[1] The district court found that Suarez had failed to exhaust his administrative remedies,

and granted summary judgment in favor of the defendants. Suarez v. U.S. Postal Serv., 178 F. Supp. 2d 69 70 (D.P.R. 2001). We review that decision de novo. Yohe v. Nugent, 321 F.3d 35, 39 (1st Cir. 2003).

Mindful that "an appellate court should refrain from writing at length to no other end than to hear its own words resonate," Lawton v. State Mut. Life Assur. Co., 101 F.3d 218,, 220 (lst Cir. 1996), we affirm the district court's decision with only the following comments. The CBA outlines a sweeping dispute resolution procedure to cover any "dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment." Suarez's claims -- whether he was sufficiently compensated and reinstated -- are clearly the types of claims the parties intended to be settled by arbitration.

Suarez cites Brennan v. Kinq, 139 F. 3d 258 (lst Cir. 1998) , for its proposition that arbitration decisions are final and binding, and asserts that his case only seeks enforcement of the arbitrator's decision. However, no arbitration decision has been reached regarding the amount or timeliness of back pay, and Suarez is therefore not yet permitted to seek redress in the courts. Vaca v. Sipes, 386 U.S.171, 184 (1967) ("[I] f the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted."). Finally, Suarez's suit against the Union also fails. He claims that the USPS breached the CBA and the Union breached its duty of fair representation; this is commonly

---

1 At oral argument, Suarez also claimed that the position to which he was reinstated is unsatisfactory. Suarez sought and ultimately received a window clerk position. He failed to elucidate why that is inadequate, and has therefore waived the argument. See Twomey. Delta Pilot Pension Plan, Nos. 02-1968, 02-2271, 2003 U.S. App. LEXIS 8638, at *11 n.4 (1st Cir. May 7. 2003).

referred to as a "hybrid" suit. See Fant v. New Eng. Power Serv. Co., 239 F.3d 8, 14 (lst Cir. 2001) ; Miller v. U.S. Postal Serv. , 985 F. 2d 9, 10 (lst Cir. 1993) . If either claim fails, Suarez cannot prevail. Miller, 985 F.2d at 11. Although the claim against the USPS remains unexhausted, we can dispose of the hybrid claim on the merits based on the allegations against the Union. A Union breaches its duty only when its actions are "'arbitrary, discriminatory, or in bad faith.'" Id. (quoting Vaca, 386 U.S. at 190). The Union had twice pursued a grievance action on behalf of Suarez. Here, Suarez did not ask the Union to seek enforcement of the arbitration awards; no rational fact finder could find that the Union acted irrationally or in bad faith. See id. at 11-12.

Affirmed.

cc: Benito Gutierrez-Diaz, Esq.
Fidel A. Sevillano Del Rio, Esq.
Stephan J. Boardman, Esq.
Arturo Luciano-Delgado, Esq.

APPENDIX

B- Order Denying Rehearing and Rehearing En Banc.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
RICHARD CUSHING DONOVAN
CLERK

JOHN JOSEPH MOAKLEY
UNITED STATES COURT COURTHOUSE
I COURTHOUSE WAY, SUIT 2500
BOSTON, MA 022 I 0
(617) 748-9057

November 12, 2003

Benito Guiterrez-Diaz, Esq.
Ave. Principal Beralt H-1
P. 0. Box 1329
Fajardo, P. R. 00738

Re: 02-1261 Luis A. Suarez v. United States Postal Service, Et Al

Dear Sir:

I acknowledge receipt of your letter dated November 4, 2003.

The petition for rehearing and suggestion for holding of a rehearing en banc was denied on October 14, 2003.You have ninety days from the date of denial of a rehearing to file a Writ of Certiorari.
Also enclosed is a copy of our docket sheet.

Sincerely yours,

Richard Cushing Donovan, Clerk
By: "S/ Julie Gregg "
Appeals Attorney

JG/rm
Enclosure:

United States Court of Appeals
For the First Circuit

No. 02-1261 LUIS A. SUAREZ
Plaintiff-Appellant
v.
UNITED STATES POSTAL SERVICE, Employer; AMERICAN POSTAL WORKERS UNION, Caribbean, Area Local, d/b/a P/P area Local 1070; UNITED STATES; WILLIAM J. HENDERSON, Postmaster General, as representative of United State Postal Services
Defendants-Appellees
MIGDALIA DELL'ANNO, Supervisor; JUAN J. TORRES, Officer in Charge; BEDA VELAZQUEZ-OLIVENCIA, LABOR Relations specialist
Defendants

Before
Chief Judge Boudin, Senior Judge Coffin, Torruella, Selya, Lynch, Lipez, and Howard, Circuit Judges

The Panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

By: "S/ Richard Cushing Donovan "
Richard Cushing Donovan, Clerk

APPENDIX

C- District Court Decision.

Held:

"In light of the foregoing, the Court finds that Suarez has failed to exhaust the grievance proceedings under the Collective Bargaining Agreement. The amount of back pay due Suarez should be determined by that procedure. Accordingly, the Court grants USPS's motion for summary judgment. Judgment shall enter dismissing the Complaint without prejudice.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day December 2001. "

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS A. SUAREZ
Plaintiff(s)

v.

U.S. POSTAL SERVICE

Defendant(s)

CIVIL NO. 98-185 (JAG)

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SAN JUAN, P.R.

JUDGMENT

For the reasons stated in the opinion and order issued on this date, judgment is hereby entered dismissing the Complaint without prejudice.

This case is now closed for statistical purposes.
IT IS SO ORDERED.
San Juan, Puerto Rico, this 12th day of December 2001.

"S/ JAY A. GARCIA GREGORY"
JAY A. GARCIA GREGORY
United States District judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS A. SUAREZ
Plaintiff (s)

v.

U.S. POSTAL SERVICE
Defendant(s)

CIVIL NO. 98-18

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U.S. DISTRICT COURT
SAN JUAN, P.R.

OPINION AND ORDER
GARCIA-GREGORY, D.J.

Plaintiff Luis A. Suarez ("Suarez") brought suit against the United States Postal Service ("USPS") , its Postmaster General, William J. Henderson, and the American Postal Workers Union, Caribbean Area Local, d/b/a Puerto Rico Area Local ("APWU") , pursuant to § 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 101 et seq. . Suarez seeks enforcement of an arbitration decision awarding him, among other things, reinstatement and back pay. Suarez challenges the method used by USPS to calculate the back pay awarded to him. Pending before the Court is USPS's motion for summary judgment. (Docket No. 47). Upon review of the record, the Court concludes that Suarez has not exhausted his administrative remedies, and grants USPS's motion.

FACTUAL BACKGROUND

On July 23, 1998, Suarez filed suit, alleging that USPS violated § 1208 (b) by breaching the collective bargaining agreement when it delayed payment of back pay to which he was entitled as a result of a favorable arbitration decision. (Docket No. 20 at 4.) Suarez claimed that the delay forced him, among other things, to declare bankruptcy, incur

needless litigation expenses, and become delinquent in his child support payments. In his opposition, however, Suarez withdrew his claims for compensatory damages under 19 (b) , (c) , (d) , and (e) of his Second Amended Complaint (Docket No. 20), and acknowledged that his entitlement to damages was "solely limited to back pay, interest and attorneys' fees .... (Docket No. 53 at 2.)

On November 26, 1997, arbitrator Joseph S. Cannavo, Jr. ("Arbitrator Cannavo") issued a decision in Suarez's favor. The award required USPS to reinstate Suarez to a position for which he would be qualified with full seniority and back pay. (Docket No. 20 at 3-4.) As a result of that decision, Suarez was entitled to back pay from March 30, 1997, the effective date of his removal, to November 26, 1997, the date on which he was reinstated to the position of part-time flexible letter carrier.[1] (Docket No. 47 at 3.)

While working as a part-time flexible letter carrier, Suarez initiated the necessary procedures to receive his back pay. Section 436 of the USPS's Employment and Labor Relations Manual sets forth the procedure for payment of back pay claims in situations where an employee is reinstated as a result of an arbitrator's decision.The procedure requires USPS to prepare two pre-printed forms: (1) "Employee Statement to Recover Back Pay," (P.S. Form

---

1. Following his reinstatement, Suarez initiated a new grievance process before Arbitrator Cannavo. Suarez claimed that that he should have been retained in the clerk craft position instead of the carrier craft position to which he was assigned. Suarez claimed that USPS treated him in disparate and discriminatory fashion. On May 7, 1999, Arbitrator Cannavo issued a ruling in Suarez's favor. The decision noted that USPS had not dealt with Suarez in a forthright manner following his reinstatement, and awarded Suarez an opportunity for window training, to which he was entitled. Suarez also received the opportunity to be assigned to a full-time carrier position in the event he failed the window training. (Docket

No. 30, Exh. 2.) 8038), and (2) "Back Pay Decision/Settlement Worksheet" (P.S. Form 8039). (Docket No. 47, Statement of Uncontested Material Facts, at 3.) P.S. Form 8038 required Suarez to state what attempts, if any, he made to obtain work during the back pay period. The Form also required Suarez to report any unemployment compensation benefits he received during the back pay period.Typically, the USPS incorporates the information provided in P.S. Form 8038 into P.S. Form 8039 so that it may compute the recipient's back pay accurately.

On February 12, 1998, Juan Torres, the Officer-in-Charge of the Rio Grande Post Office, provided Suarez a copy of P.S. Form 8038. In a letter dated February 17, 1998, Suarez informed Torres that he would not complete the form because it requested information regarding his efforts to obtain employment during the back pay period. Suarez claimed that because the USPS had not raised the issue of mitigation of damages at the arbitration hearing, it was precluded from raising it during the processing of his back pay claim.

In a February 25, 1998 written response, Torres informed Suarez that he was not aware whether the USPS had raised the mitigation issue at the hearing, but explained that he regarded the issue as irrelevant because the "USPS is not disputing [your] monetary award." Torres stated that he needed Suarez's cooperation in filling out the form in order to process the back pay claim. Suarez, however, did not fill out the form.

On July 20, 1998, following a July 8, 1998 conversation with Torres, Suarez produced a completed P.S. Form 8038. After receiving P.S. Form 8038, Beda Velazquez, a USPS labor relations specialist for the Caribbean District, asked Suarez to sign P.S. Form 8039 to expedite the processing of his back pay claim. On July 23, 1998, Suarez filed suit before this Court.

In June 1999, Suarez received back pay in the amount of

$32,331 and $2,665.87 in interest. The USPS did not offset from Suarez's back pay award any interim earnings or unemployment compensation benefits.

DISCUSSION

The standard for summary judgment is governed by Fed.R.Civ.P. 56. The Court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56 (c) ; See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (lst Cir. 2000). The party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

A properly supported motion can be survived only if the nonmoving party shows that a trial worthy issue exists. The party opposing the motion cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute. Not every controversy is sufficient to preclude summary judgment. The fact has to be "material" and the dispute must be "genuine." "Material" means that a contested fact has the potential to change the outcome of a suit. The issue is "genuine" when a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

"The mere existence of a scintilla of evidence is insufficient to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 252. Consequently, in order to defeat the motion, the party opposing summary judgment must present competent evidence supporting its position. Maldonado-Denis v.

Castillo Rodriguez, 23 F.3d 576, 581 (lst Cir. 1994) . To make this assessment in a given case, the Court "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (lst Cir. 1990). When carrying out that task, the Court may safely ignore "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F. 2d 5, 8 (lst Cir. 1990).

A. Arbitration and Back Pay

Suarez claims that the USPS failed to pay his back pay in timely fashion, and he also claims that the Union declined to seek enforcement of the arbitration award in federal district court in order to recover his back pay. Additionally, Suarez claims that the USPS did not pay him properly, since it miscalculated the amount of back pay by relying on the hours of an "atypical" USPS employee. (Docket No. 53 at 3.)

He contends that the Court has jurisdiction to entertain his claim that the USPS breached the collective bargaining agreement by failing to pay him his full back pay and interests. Since he has not shown that he has exhausted administrative remedies, the Court disagrees.

Suarez contends that his back pay claim is governed by the Back Pay Act, 5 U.S.C. § 5596, and not by § 436.425 of the Employee and Labor Relations Manual. (Docket No. 53 at 2.) USPS argues that the Back Pay Act does not apply because Suarez's original back pay claim was not heard before the Merit Systems Protection Board, but rather was handled by the grievance arbitration procedure of the collective bargaining agreement. Suarez has not provided support to rebut the USPS's position that MSPB decisions do not control in the context of grievance arbitration decisions rendered pursuant to a collective bargaining agreement. See,

e.g., Miller v. USPS, 792 F. Supp. 4, 7 (D.N.H. 1992), aff'd, 985 F.2d 9 (1st Cir. 1993) (applying the ELM provisions to an arbitration decision) .

Even if the Back Pay Act did apply here, the USPS contends that Suarez has failed to exhaust arbitration and grievance procedures pursuant to the collective bargaining agreement.[2] Indeed, Suarez has not proffered a persuasive rationale as to why he should not be required to exhaust administrative remedies and to pursue his grievance through the collective bargaining agreement.

The four principles to be considered when reviewing an arbitration award pursuant to a collective bargaining agreement stem from the Steelworkers Trilogy of cases decided by the United States Supreme Court in 1960. See Newspaper Guild of Salem v. Ottaway Newspaper, 79 F.3d 1273, 1279 (lst Cir.1996) (citing AT & T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 648-51 (1986)). The four principles can be summarized as follows: (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit; (2) the question whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination; (3) in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the merits of the underlying claims; and (4) where the contract contains an arbitration clause, there is a presumption of arbitrability.

After reviewing the record, the Court finds that the parties had agreed that arbitration would be the appropriate forum for settlement of all claims arising under the Collective Bargaining Agreement. The Agreement at issue

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2-Suarez further contends that he had no duty to mitigate damages. Even if he did, it is uncontested that the USPS did not offset his back pay award in any manner.

here contains a broad arbitration clause that provides for arbitration in all situations that "involve the interpretation, application of, or compliance with the provisions of this Agreement., See Collective Bargaining Agreement Article 15(l)(defining "grievance" as "a dispute, disagreement or complaint between the parties related to wages, hours and conditions of employment").

In the period between Suarez's reinstatement (November 26, 1997) and July, 1999, Suarez brought this action, seeking enforcement of the terms of the initial arbitration award. Since USPS issued Suarez two checks in July, 1999 covering back pay and accrued interest, the issue left to resolve is whether Suarez received the amounts to which he was duly entitled. The propriety of the amount of back pay awarded is a matter subject to the grievance procedure established in the Collective Bargaining Agreement. Under the terms of the Agreement, Suarez is required to submit his grievance to arbitration.

In cases such as this one, the Supreme Court has stated that, in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. See AT&T Tech. , Inc., 475 U.S. at 650 (citing United Steelworkers of Am. v. Warr N. Co., 363 U.S. 574, 585 (1960)). The Court should not decline to order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers, 363 U.S. at 582-83. No such evidence has been presented here. Aside from the matters that the parties specifically exclude, all issues on which the parties disagree are included within the scope of the grievance provisions of the collective bargaining agreement. id.. at 581.

CONCLUSION

In light of the foregoing, the Court finds that Suarez has failed to exhaust the grievance proceedings under the Collective Bargaining Agreement. The amount of back pay due Suarez should be determined by that procedure. Accordingly, the Court grants USPS's motion for summary judgment. Judgment shall enter dismissing the Complaint without prejudice.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day December 2001.

"S/ Jay A. Garcia Gregory "
JAY A. GARCIA GREGORY
Unite States District Judge

APPENDIX

D- District Court Ruling Denying APWU's Motion to Dismiss and Summary Judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PURTO RICO
LUIS A. SUAREZ

Plaintiff

vs. **CIVIL 98-1854 (CCC)**

UNITED STATES OF AMERICA and UNITED STATES POSTAL SERVICE, EMPLOYER MIGDALIA DELL'ANNO, SUPERVISOR, AN INDIVIDUAL JUAN J. TORRES, OFFICER IN CHARGE, AN INDIVIDUAL BEDA VELAZQUEZ-OLIVENCIA, LABOR RELATIONS SPECIALIST, and INDIVIDUAL,AMERICAN POSTAL WORKERS UNION, CARIBBEAN AREA LOCAL, d/b/a PURTO RICO AREA LOCAL, LOCAL 1070, A UNION

Defendants

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U.S. DISTRICT COURT

O R D E R

Having considered the Motion for Summary Judgment filed by defendant American Postal Workers Union, Local 1070 (**docket entry 30**) and plaintiff's opposition (**docket entry 33**), the same is DENIED, inasmuch as there are issues of material fact on whether the defendant union breached its duty of fair representation on the back pay award which preclude the entry of summary judgment.

SO ORDERED.

At San Juan, Puerto Rico, on March 23, 2000.

"S/ Carmen Consuelo Cerezo "
CARMEN CONSUELO CEREZO
United States District Judge

APPENDIX

E- Relevant Provisions Involved.

RELEVANT PROVISIONS INVOLVED

STATUTES

1- Postal Service Reorganization Act (PRA), 39 USC § 101, et seq. provides in pertinent parts:

39 USC §409(a) Suits by and against the Postal Service.

"(a) Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service.

39 USC §1005 (a)(2) and (4)

"(2) The provisions of title 5 relating to a preference eligible (as that term is defined under section 2108(3) of such title) shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title.

(4) (A) Subchapter II of chapter 75 of title 5 shall apply -(i) to any preference eligible in the Postal Service who is an employee within the meaning of section 7511(a)(1)(B) of such title;..."

39USC §1207 Labor disputes:"(a)(2)

"Decisions of the arbitration board shall be conclusive and binding upon the parties."

2-Veteran's Preference Act of 1944, 58 Stat. 387, 390 as amended by Public Law 80-623 of June 10, 1948, 62 Stat. 354, as applicable to the US Postal Service under 39 USC §1005 (a)(2). Amended by **Back Pay Act of 1966, 5 USC**

§5596, et seq., Pub. L. 105-261, div. A, title XI, Sec. 1104(a), Oct. 17, 1998, (112 Stat. 2141.)

Back Pay Act of 1966, 5 USC §5596, et seq., and its implementing regulation, 5 CFR 550.801-808.

5 USC 5596 - Back pay due to unjustified personnel action.

(a) For the purpose of this section, "agency" means -

(1) an Executive agency;

(2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b)

(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted
personnel action which has resulted in the withdrawal or reduction of all or part of the
pay, allowances, or differentials of the employee-

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect -

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during

the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that -

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2)

(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest -

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

APWU-USPS Contract Bargaining Agreement ("CBA")

This Agreement (referred to as the **1994** National Agreement) is entered into by and between the United States Postal Service (hereinafter referred to as the "Employer") and the American Postal Workers Union, AFL-CIO (hereinafter referred to as the "Union"), pursuant to an Arbitration Award issued **October 1, 1995 and Supplemental Award issued June 7, 1996**. In accordance with terms of this Award, the Agreement is effective as of the date of the Award unless otherwise provided.

The CBA contains 37 articles of which Articles 1,5,15, and 19 are relevant in the instant case. The relevant provisions are:

ARTICLE 1
UNION RECOGNITION

The Employer recognizes the Union designated below as the exclusive bargaining representative of all employees in the bargaining unit which has been recognized and certified at the national level:

Bargaining Unit: American Postal Workers Union, AFL-CIO—Postal Clerks.

ARTICLE 5

PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Article 15, Sec. 1

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Article 15, Sec. 5.A.6

"All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article,..."

Article 15, Sec. 5.A.9

" In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. **Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding."**

ARTICLE 19
HANDBOOKS AND MANUALS

"Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believe the proposed changes violate the National Agreement

(including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance."

APPENDIX

F- Petitioner's Letters of Complaints of USPS' s refusal to Comply.

LETTER DATE JANUARY 9, 1998

To: Carlos I. Rodriguez
National Business Agent
APWU, Local 1070
GPO Box 363983
San Juan, PR 00936

Jan. 9, 1998
Fajardo, P.R.

Dear Carlos I Rodriguez,

Migdalia Dell'anno is trying hard to confuse and change a looser into winner by wasting
U.S. Postal Service Funds, a serious and unlawful procedure. Clarification of the ambiguous statement as follow:

"Arbitrator directs Postal Service to reassign the grievant to a position for which he has the qualification to perform the work either in the clerk craft or in the carrier craft" meanwhile the award states "Grievance sustained" and "...the Arbitrator is compelled to sustain the grievance in its entirety". This is due to the fact as acknowledge by arbitrator in first paragraph of page 28 that Suarez did qualified performing the work in the clerk craft from 9/30/95 to March31,1997. So he is qualified to work either in clerk craft or letter carrier craft. It is for Suarez to make the choice between Window Clerk and Letter Carrier due to the fact that two years ago he wants to return to Letter Carrier Craft. In page 28 he made clear that Suarez was performing clerk craft. In the other hands the Postal Service in order to abide by the AWARD must send me to Clerk Training. So it is nonsense, not an intelligent decision in the best interest to U.S. Postal Service the letters below.

Letter date Nov. 25,1997 from Juan Torres ordered me " to report to Letter Carrier duties and if I fail to report I will be

charged with A.W.O.L. and disciplinary action will be taken".

Letter date Jan.2,1998 Dell'anno sent me another letter that states as follow:

"A review of both the arbitrator's award and **your Official Personal Folder revealed that you are qualified as a Letter Carrier which was your official duty prior to your change of craft. Based upon the foregoing, you have been reassigned as a City carrier Part Time flexible (Q-05)** at Rio Grande Post Office effective November 26,1997. This office will initiate the corresponding action to process a Personnel Action through PS Form 50, reflecting your reassignment to the carrier craft".

Signed by Migdalia Dell'anno, A/Manager Human Resources.

My Official Personal Folder states:

A- Migdalia Dell'anno is the person that:

1- On Sept. 28,1996 welcome me at the office saying "I remember you, you gave me lot of problems when I work at personnel". Note: She was referring to an EEO complain I filed at that office on charges of discrimination for been veteran with 30% disability.

She established a hostile environment against me. Deprived me of all benefits and rights provided to me in ELM, Handbook EL-311 and APWU Contract but yet was ready to file charges against me.

2- Later states on the floor three times: "no matter what happen Luis Suarez was not going to get the position of Residual Vacancy", available for me as Senior PTF Preference Bidder for the position or any other available.

3- When I complaint of her close supervision and harassment over me, she began to search evidence against me. She desperately present false evidence against me.

4- One occasion she said: " I don't even love Suarez. Made a pause and said: "Anyway! I don't have to love him I have a husband. Many times also, made comments around me saying "I am glad I can't have babies, after everybody is gone and she hold me at work until late.

5- This is the same person that cancelled a visit from the Office of EEO to meet with me.

6- This is the same person that compelled Juan Torres to make charges against me and removal.

7- This is the same person that induced Israel Rivera (Training Coordinator) and compelled him to tamper the process of my examination and to falsify a federal government document, submit false information to a federal government office in violation of 18 USC 1001 considered a Federal Crime." The furnishing of false information on a government matter may result in a fine of not more than $10,000 or imprisonment of not more than 5 years or both. 18USC1001". B-Facts that qualify me in Clerk Craft as arbitrator acknowledge in first paragraph page 28:

(1) Suarez has been performing Clerk Craft work since 9/30/95(when he became clerk) to1/8/98, more than 2 years as his record and PS Form 50 shows.

(2) On December 1996 there were 3 employees absent in Clerk Craft in Rio Grande and Mr. Suarez was performing all the work available in the floor without not even one complain from customers accounted on record.

(3) Mr. Suarez volunteer himself to work 7 days in a week during this circumstances for the best interest of his employer as his record shows.

(4) It is also in his record that he was performing more that 11 hours daily during the last 3 month before he was removed from his outstanding performance of duty for the best interest to his employer.

(5) Also the record shows that even when Dell'anno falsified evidence to disparately discriminate on him, in order to threaten him and harassed him, his was keeping with the

highest moral and pride to give the best performance to his employer the U.S. Postal Service.

(6) All the work that is available for him in Rio Grande Station as the Senior PTF Clerk Preference Bidder has been assigned to 1 Casual and 2 Letter Carrier on L/D who never been qualified for Clerk, neither having Suarez experience and performance as his record shows and in a clear violation of U.S. Postal Service own rulers as the Arbitrator states in his award: " When an employer chooses to violate it own rules and regulations, it enters the realm of discipline without clean hands. As such, it is culpable for all of its actions".

It is to the Postal Service to ask Suarez in which Craft he wants to work at. He is in the Clerk Craft already and wants to stay as Window Clerk, Senior PTF Preference Bidder for the position of Residual Vacancy available for him.

Migdalia Dell'anno is pushing to fulfill her threat of:
" no matter what happens, Mrs. Suarez was not going to get the residual vacancy of Window/Distribution Clerk" an unlawful and disparately discrimination against me.

Interim award vs. Final Award

An interim relief is in effect until a final relief is delivery. The final relief therefore makes an interim relief ineffective and obsolete. For this reason the statement in the interim award that follows is ineffective:

"Arbitrator will retain jurisdiction over the implementation of this award." So far, she have been accomplishing her threaten to me and continues the disparately harassment in order to fulfill her personal objectives and goals of infringing me serious damage. The arbitrator award is clear "Grievance sustained", "Grievance sustained in its entirety".

This award did not direct the Postal Service to negotiation but to abide to the arbitrator's determination and Article

15.5.A.6 "ALL DECISIONS OF AN ARBITRATOR WILL BE FINAL AND BINDING". Postal Service must comply as follows:

Remedy sough in grievance:

During arbitration it was agreed by all parties involved to consolidate grievance 97-230 and 97-432.

Grievance 97-230 Step 1 Union requested in item D) Corrective Action:

1-Union request that Notice of Proposed Removal be expunged and removed personal record of grievant and never mention again.

2- Union request that if grievant due to such letter of charges receives any lost what so ever, he be made whole, all lost at it's appropriate rate, including craft, grade, and seniority .

3- Grievant still wants a fair chance to pass window training exam if management still insist that he has not qualified. Grievance 97-432 Step 1 Union requested in item D) Corrective Action:

1-Union request that Letter of Decision-Proposed Removal be rescind and expunged from grievant personal record.

2-Union request that grievant be made whole all lost which he may encounter during his removal including wages, over time, travel times, mileage, grade, job position and any other lost which he may encounter.

In the Closing Argument from APWU dated August 29,1997 before Joseph Cannavo, Arbitrator Jr., in the last paragraph union stated the following:

"Based on all the evidence and testimony submitted in this hearing we request that you grant this grievance in total and to rescind the proposed removal of grievant making him whole for any financial loss including but not limited to back pay with interest, that he be given the opportunity to qualify for the Distribution and Window Clerk Residual Full Time vacancy at the Rio Grande Post

Office, and if he doesn't qualify to offer him the opportunity to transfer to G.P.O. San Juan, Puerto Rico".

Remedy sough summary:

1-be made whole, all lost at it's appropriate rate, including craft, grade, and seniority.

2-grievant still wants a fair chance to pass window training exam.

3-letter of decision be rescind and expunged from grievant personal record.

4-be made whole all lost which he may encounter during his removal including wages, over-time , travel times, mileage, grade, job position and any other lost he may encounter.

5-grant this grievance in total and to rescind... ...making him whole for any financial loss including but not limited to back pay with interest,

6-opportunity to qualify for the Dist./Window Clerk residual full time vacancy at Rio Grande Post Office, and if he doesn't qualify to offer him the opportunity to transfer to GPO, San Juan, P.R.

We got our GRIEVANCE SUSTAINED lets abide by this. Yet I have various avenues to go throughout. I will follow through.

Sincerely,

"S/ Luis A. Suarez "
Luis A. Suarez
D-20 Rafael Bermudez
Fajardo, P.R. 00738

cc. Daniel Soto
APWU, President

Certified Mail # P091790283

LETTER DATE JANUARY 22, 1998

January 22,1998

Mr. Juan J. Torres
OIC Rio Grande Station
Rio Grande, P.R. 00745

Dear Mr. Torres,

This is a continuation of my request from Nov. 26 and our meeting dated Dic.13 where APWU representative Roberto Rodriguez continued the requesting that my reinstatement be made in the Clerk Craft.

We acknowledged that arbitrator directed Postal Service to reassign me in either craft. But it is also acknowledged by you that I have been interested in the window clerk residual vacancy and that the provisions of the U.S. Postal Service and Contract Agreement provide me certain rights, benefits, and entitlement which I been exercising from Nov. 26 up to day as a career employee of Rio Grande. Be acknowledged by you that arbitrator also states before the reassignment statement that "The Grievant shall be reinstated to the Postal Service with full seniority and with full back pay and all other benefits and entitlement". I have not been reinstated accordingly and neither to the facts of my performance which deprive me of my full seniority, benefits and entitlement. It is not a wise decision and neither in the best interest of U.S. Postal Service to reassign me in other than the clerk craft due to the foregoing and the following facts.

1- As a Rio Grande Station career employee my interest in the clerk craft is first to be considered before any out of station applicant.

2- Due to the fact that I have the qualifications to perform the work in the clerk craft as revealed by the facts that I have been performing Clerk Craft work from 9/30/95 to 1/8/98, more than 2 years as my record and PS Form 50 shows.

3- On December 1996 there were 3 employees absent in Clerk Craft in Rio Grande and I was performing all the clerk work available in the floor without not even one complain from customers accounted on record.

4- Due to above I volunteered myself to work 7 days in a week to cover the absent of this 3 employees for the benefits and best interest of U.S. Postal Service as my record shows. It is also in record that I was performing more than 11 hours daily from Sept 28,1997 to March 30.

5-Also I had my vacations from March 8, 1997 to March 30,1997 approved since December 31,1996. On Friday 7,1997 I was asked by Dell'anno if I could work voluntarily on next Saturday, March 8 (the beginning of my vacation) because management did not have an employee on schedule and available that day. I agree to work on that day for the benefits and best interest of the U.S. Postal Service.

6- I have been deprived of recognition for all the above which has merit for a letter of performance achievement as it has been given to me in other occasion before. See attached copy.

Based upon the foregoing **I request that my Full Seniority, Benefits and Entitlement be recognized by Postal Service, that be reinstated in the clerk craft for the**

residual vacancy available and be sent to the next training on schedule for window clerk training to fully qualify, as this has been the procedure followed for all window clerk in the performance of the duties. Also **to comply with Back Pay** ordered as soon as possible.

Sincerely,
"S/ Luis A. Suarez "
Luis A. Suarez
Rio Grande Station
Rio Grande, P.R. 00745

cc: Human Resources
Caribbean District
585 Ave. F.D. Roosevelt
San Juan, P.R. 00936

Mr. Roberto Rodriguez
APWU, Northern Area
Vice-President
Dorado, P.R. 00624

SIGNATURE ON RECEIPT

Received by : "S/ Juan J. Torres " Date 1-26-98

LETTER DATE FEBRUARY 2, 1998
February 2,1998

Mr. Juan J. Torres
OIC Rio Grande Station
Rio Grande, P.R. 00745

Dear Mr. Torres,

This is a continuation of my request from Nov. 26, 1997 and our meeting dated Dic.13, 1997 where APWU

Representative Roberto Rodriguez continued the requesting that my reinstatement be made in the Clerk Craft.

As you are aware arbitrator also states that "The Grievant shall be **Reinstated** to the Postal Service with **FULL SENIORITY** and with **FULL BACK PAY** and **ALL OTHER BENEFITS AND ENTITLEMENT"**. **It has passed more than 60 days from the Arbitrator's Order. Back Pay, Annual Leave and Sick Leave has not been adjusted yet. I request that Back Pay and the interest accrued be pay within the next 30 days and all leave be adjusted. Otherwise, a legal fee will be required if legal enforcement would proceed.**

Luis A. Suarez
Rio Grande Station
Rio Grande, P.R. 00745

cc: Human Resources
Caribbean District
585 Ave. F.D. Roosevelt
San Juan, P.R. 00936

Lic. Harold E. Hopkins
DD6 Villas de Playa II

Dorado, P.R. 00646

Mr. Roberto Rodriguez
APWU, Northern Area
Vice-President, Dorado Station
Dorado, P.R. 00624

SIGNATURE ON RECEIPT
Received by "S/ Miguel A. Burgos " Date 2-9-98

LETTER DATE FEBRUARY 17, 1998

To: Mr. Juan J. Torres Page 1 February 17, 1998
OIC Rio Grande Stations In Rio Grande, P.R.
Rio Grande, P.R. 00745

Re: Letter date Feb. 12, 1998, Form 8038 from you.

Dear Mr. Torres:

As we discussed briefly on Feb. 12, 1998 when you issued to me the letter mentioned above w/Form 8038, you have

raised the issue of the ELM Sec. 436. According to Federal District Courts ruling as you did not raised this issue during the arbitration proceeding your waived your right to now raise this issue. Due to the nature of this procedure creates a direct conflict with the arbitrator's award and Article 15 of the National Agreement.

US District Court decisions, Back Pay Award v. Sec. 436

Note: Citations from news article "Industrial Relations Department by Greg Bell", "THE AMERICAN POSTAL WORKER" newspaper, issue August 1997, page 9.

1- US DISTRICT COURT, WESTERN DISTRICT OF PENSYLVANIA, JUNE 18, 1997.

Pittsburgh Metro Area Local complaint to enforce the arbitration. CASE # CA 95-1706 Arbitration Award issued June 21, 1995.

Court ruled in favor of the union's motion for a judgment as a matter of law.

Issue : Court said: "whether the issue concerning the mitigation of damages should be presented at the arbitration hearing or decided after the arbitration hearing". "The nature of this procedure [under Section 436] creates a direct conflict with the arbitrator's awards and with Article 15 of the National Agreement." The court also said that many other courts have ruled that: "The failure of an employer to raise the issue of mitigation of damages during arbitration proceedings effectively waived its right to raise the issue in an enforcement proceeding." The court said: "The Postal Service has not presented any evidence or cited any authority which demonstrates that the Section 436 procedure is to be implemented after the arbitrator issued an award." "Clearly, the Postal Service should have raised its Section 436 arguments regarding ... [the employee's] ... back pay award during the course of the arbitration hearing." The court held that the Postal Service has thus: "waived its right to now

dispute the award". The court ordered the USPS to provide back pay to the employees : "pursuant to the terms of their arbitration awards".

2- US DISTRICT COURT, EASTERN DISTRICT OF NEW YORK CASE # 88-C-1974, 1989. Federal Court case filed by the Brooklyn, NY Local and later joined by APWU at the National Level.

The Union sought to enforce an arbitration's award that called for an employee to received back pay less any earnings he received during the period between his removal and his return to work. As a matter of law, the Union argued that it presented mitigation evidence at the hearing and thus the arbitrator's award of back pay was binding on the Postal Service. The court noted that while "Section 436 of the Manual [ELM] provides a procedure for determining whether back pay is due and, if so, in what amount, it does not by its language require a separate grievance over the issue of back pay". The court then held that: "[t]o require the National Union to re exhaust the grievance and arbitration procedure under Section 436 of the Manual [ELM] would conflict with Article 15 of the National Agreement which provides that the arbitrator's decision is final and binding." The court therefore ordered that the arbitration decision awarding the employee back pay be enforce.

Mr. Torres, based upon the foregoing I will abide by the courts decision. The letter w/ Form 8038 will be keep as proof that you raised the issue of Sec. 436 in clearly contempt to a court orders with the intention to deny the back pay.

From:
"S/ Luis A. Suarez"
LUIS A SUAREZ
Rio Grande Station
Rio Grande, P.R.00745

cc:
Human Resources Personnel Office
585 Ave FD Roosevelt
San Juan, P.R. 00936-9994

Lic. Harold E. Hopkins
DD6 Villas de Playa II
Dorado, P.R. 00646

Mr. Roberto Rodriguez
APWU, Northern Area
Vice-President
Dorado, P.R. 00624

Signature on receipt by: "S/ Juan J. Torres "
Date 2/25/78

Docket # 33

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

An Individual
Luis A. Suarez,
Plaintiff

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U.S. DISTRICT COURT
SAN JUAN, P.R.

v.

Civil No. 98-1854 CC
Action to Enforce Arbitration Award, Violation of Civil Rights, Damages

United States of America and
United States Postal Service, Employer
Migdalia Dell'anno, Supervisor, an individual
Juan J. Torres, Officer in Charge, an Individual
Beda Velazquez Olivencia, Labor Relations Specialist, an Individual,

American Postal Workers Union, Caribbean Area Local, dba Puerto Rico Area Local, Local 1070, a Union.

Defendants

Memorandum of Law In Support Of Plaintiff's Opposition To Defendant's Request for Summary Judgment

I. Plaintiff is not Required to Exhaust Administrative Remedies

The facts in this case do not require the plaintiff to further exhaust any administrative procedures in the grievance procedure prior to seeking redress in federal court when his claim is based on a failure of the union to provide fair representation. This is a hybrid case in the sense that the Employer is also joined in such a claim as a party. This has been decided by decisions relating to Section 301 of the Labor Management Relations Act, (LMRA) 29 USC 185 (a), which are binding relating to interpretations of 39 USC 1208 (b). See ***Clayton v. United AutoWorkers***, *451 US 679 (1981)* interpreting exhaustion when a remedy is not available to a plaintiff.

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The theory of the plaintiff is that the defendant labor organization American Postal Workers Union, Caribbean Area Local, AFL-CIO ("APWU"), has failed to comply with its duty of fair representation, by failing to file a legal action seeking to enforce the lawful arbitration award within the time frame of one year. By failing to do so, the labor organization has failed in its duty of fair representation to the plaintiff, since it now has no recourse to obligate the employer, U S Postal Service, to comply with the instant lawful arbitration award. This is due to the Puerto Rico Supreme Court decision in ***J.R.T. v.. Puerto Rico Telephone Company,*** *107 D.P.R. 76 (1978),* which applies the one-year term of laches to enforcement of arbitration awards in Puerto

Rico. Since the rationale in ***Derwin v. General Dynamics Corp.***, *719 F. 2d. 484, 490 (1st Cir. 1983)* is applicable in this matter, as to the use of state law in determining the statute of limitations on actions to enforce arbitration awards, the time limit in Puerto Rico would be **one year** (my emphasis).

This being the instant case, the sole remedy available to the plaintiff to enforce a lawful and final arbitration award in his favor, is to now seek redress for the union's failure in its duty to provide fair representation due to its perfunctory and arbitrary handling of his grievance, since the union cannot enforce the award after the expiration of the one-year time period. Likewise, an action lies against the employer, United States Postal Service, for breach of contract since it has repudiated the contract due to its non-compliance during the same **one year** period.

The plaintiff then after the expiration of the one-year period of time, may step in the shoes of the labor organization under the theory that it has failed to duly represent the

plaintiff, and exercise his own action against both the employer and the union. See ***Lofton v. US Postal Service***, *592 F. Supp. 36 (1984), at page 39.*[1]

A failure to provide fair representation has been found by the failure of a union to proceed with a meritorious grievance by missing a time frame during the procedure. See ***International Brotherhood of Electrical Workers v. Foust***, *442 US 42 (1979)* where a union was held responsible for missing a time period by 2 days, leaving the grievant without a remedy. The courts have held where a union has neglected the procedural time limits, it will find a failure of fair representation without the necessity of a showing of invidious, discriminatory or bad faith conduct. This is especially true where the arbitration award is favorable to the grievant, as is the case here. A failure of duty of fair

representation lies where the union acts in a perfunctory and arbitrary manner in the handling of the grievance. See ***Vaca v. Sipes, 386 US 171, at 190-191***; ***Ruzicka v. General Motors Corp.***, *523 F.2d 306 (6th Cir.1975)*, rehearing denied; ***Foust v. International Brotherhood of Electrical Workers***, *572 F.2d 710 (10thCir.1978) cert. denied 43 9 US 892 (1978).* See also ***Lofton***, *supra*, ***Vaca v. Sipes***, *supra*, 386 US 171, at 194.

In this regard, the Supreme Court has decided that in cases of failure to provide fair representation, the plaintiff does not have to re-litigate his claims through the grievance procedure, rather, he may proceed directly to an enforcement action against both the union and the employer. This is of course governed by the six months time frame, as adopted by ***DelCostello v. Teamsters***, *462 US 151 (1983).* Here, this would be within **6 months** following November 26, 1998.

1-It should be noted that the facts here are distinct from **Lofton**, supra, in that here, **the plaintiff is seeking to enforce a lawful arbitration award** rather than. as **Lofton**. who was seeking to overturn an unfavorable arbitration award.

II. The Arbitrary Handling, Of The Award By The Employer And The Union

The plaintiff here notified the union of the problems he was having in obtaining the payment of his back pay since January 1998. The defendant labor organization, to the Plaintiff's knowledge, did nothing. See ***Colon Velez v. PR Marine Management, Inc.***, *957 F.2d 933 (1st Cir. 1992) at pages 940, 941*, where a violation was found of fair representation for the labor organization's failure to act. In fact, when the plaintiff inquired about the union's efforts to obtain back pay, he was informed no grievance was active on this issue as of November1998 (Plaintiff Exhibit 1, answer 5, section 12.)

The union has a duty to seek compliance with a favorable arbitration award. See, ***Lofton v. U S Postal Service***, *supra at pages 38 and 39*, citing ***F.W. Woolworth,***

629 F2d 1204, at 1210, 1211, where the court defined the Union's duty of fair representation "requires it to take meritorious disputes to arbitration and defend favorable arbitration decisions in Court. Where the union falls to do so, the employees may step into the shoes of the union and so have a right to do so. Here, the APWU failed to diligently enforce the back pay award[2], thus the plaintiff has a right to pursue this action after the expiration of the time allotted for enforcing an award expired.

There is no need to further re-litigate this issue before the arbitrator, rather the proper action is an seeking an order to compel compliance with the arbitral award. See ***Locals 2222, 2320, 377 et al., v. New England, Etc.***, *628 F2d 644, at page 649*, cite:

"To require the Union to invoke the "time consuming and burdensome grievance procedure again in order that the parties might resolve the remnants of a dispute which has already once traveled that route would seriously

undermine the chief policies underlying resort to those procedures in the first instance: the speedy, flexible and inexpensive resolution of labor disputes".

Rather, as discussed in ***Pittsburgh Area Metro Postal Workers Union v. US Postal Service,*** *(W. D. Pennsylvania 1997 Memorandum Decision),* copy attached hereto, and ***American Postal Workers Union, Brooklyn Local v. U.S. Postal Service,*** *(E.D.N.Y.1989)* the proper action for the union was to seek enforcement action, not re-arbitrate the matter, even if part of the favorable award has some ambiguous language. The Court always has the option or

remanding to the arbitrator any ambiguous language in the award, which needs clarification, not re-arbitration, a much more costly proceeding which eventually ends with another award to be complied with or not complied with.

Here, the back pay award issue was clear and unambiguous. The plaintiff sought the Union's assistance constantly for over 1 year and ended with nothing gained. The Union failed to do so, thus it has breached its duty of fair representation by its perfunctory handling of this matter.

Likewise, the plaintiff alleges that the US Postal Service, employer, also willfully rejected the collective bargaining agreement by its failure to comply with the lawful arbitration award. In this regard, it has arbitrarily refused to process the back pay nor had it even submitted back pay computations to the grievant for his review as required by its own internal procedures. This action also accrued on November 26, 1998,

The plaintiff submits that the procedures followed in cases discussed above similar to the one at bar should govern this proceeding without resort to filing of new grievances over the failure to comply with the award, go again to arbitration, get another award and then be back where you started. This simply is not the intent of the law. See ***Clayton***, *supra*, ***Foust***, *supra*, ***Lofton***, *supra*, ***Pittsburgh***, *supra*, ***Brooklyn Local***, *supra*, ***Locals 2222***, *supra*, ***Colon-Velez***, *supra*, ***F.W. Woolworth.***, *supra*, ***Lofton***, *supra*.

2-The defense by defendant union that it "had no resources" is a sham. How could it then invoke a more costly procedure of a second arbitration ? Nor does it explain why it did not seek assistance from its national office.

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where the union was not obligated to re-litigate the matters nor seek another arbitration award. Here, the plaintiff should not be obligated to have to re-litigate through arbitration an award completely favorable to him. Rather, this is a matter

that can be decided quickly by a motion for summary Judgment once the court has jurisdiction over the parties and the plaintiff so move.

III. The Plaintiff's Current Back Pay Status and Right to Damages

Petitioner hereby informs this Court that on or about June 16, 1999, the Plaintiff received a payment purported to be the back pay owed to Plaintiff. Plaintiff is reviewed the computations made for the arbitral award back pay and objected thereto to Defendant U S Postal Service, with copies to Defendant union. The remaining issues for trial have been narrowed, however, Petitioner contends that the payment of arbitral award back pay does not moot the issue of damages caused to Plaintiff nor the lack of fair representation by the defendant union. This all could have been avoided had both the USPS and APWU complied with their respective duties toward plaintiff to promptly effectuate the favorable award to Petitioner. Rather, the U S Postal Service attempted to process this claim in violation of plaintiff s rights as a veteran preference eligible with disability, later by failing to provide computations of back pay to plaintiff and requiring him to sign a "blank check", and then only providing some computations to plaintiff in April 1999, which he was not in agreement with. Neither is the Petitioner in agreement with the interest paid thereon.

The plaintiff is entitled to the full back pay amount awarded him, interest thereon, compensatory or actual damages, and in cases of failure of providing fair representation, the

attorneys fees, court costs, and other costs and expenses of litigation and actual damages. As to the latter , see Milstead v. International Brotherhood of Teamsters 957, 649 F. 2d. 395 (6th Cir. 1991)- Cert. denied 102 S. Ct. 394 (1981).

WHEREFORE, it is requested that Defendant APWU's motion for summary judgment be denied, and that the Court order such provision and take such action to simplify the remaining litigation.

Respectfully submitted this 23rd day of August, 1999 at Hato Rey, Puerto Rico.

"S/ Harold E. Hopkins Jr. "
Harold E. Hopkins Jr.
Attorney for Plaintiff
US District Court # 126501
DD-6 Villas de Playa 2
Dorado, PR 00646
Tel. (787) 796-1838

Certificate of Service

I certify that on this same date I have served a true copy of the above-entitled Motion as follows:

Fidel Servillano, Esq.
Asst. U S Attorney
US Federal Building,
150 Chardon St.
Hato Rey, PR 00918

Arturo Luciano Delgado, Esq.
I.L.A. Building PentHouse Suite
Kennedy Ave. (marginal)
San Juan, PR 00920

"S/ Harold E. Hopkins Jr. "
Harold E. Hopkins Jr.
Attorney for Plaintiff

Docket # 53

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Luis A. Suarez
An Individual , Plaintiff

Vs.

United States of America and
United States Postal Service,,
William J. Henderson,
Postmaster General, Employer
and
American Postal Workers Union,
Caribbean Area Local, dba P.R.
Area Local, Local 1070,a Union, et als
Defendants

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DISTRICT COURT
SAN JUAN, P.R.

Civil No. 98-1854 CC
Action to Enforce
Arbitration Damages, And
Back Pay,
Jury Trial

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT UNITED STATES POSTAL SERVICE MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS COMPLAINT

I. PRELIMINARY MATTERS

This is in response to the Motion by Defendant, William J. Henderson, Postmaster General, opposes the claims set forth in the Second Amended Complaint for bankruptcy legal expenses, child support legal proceedings, extra-expenses for job classification errors and for damages to his credit ratings. This was discussed at the pre-trial conference held this past June 9, 2000 wherein it was agreed to try to streamline this matter.

The plaintiff, having researched this issue, and in view of the Court's request, hereby withdraws its claims under paragraphs 19 (b), (c), (d) and (e) of the Second Amended Complaint, and in the prayer for relief for said items, without prejudice, since the same are truly not cognizable within the scope of this Title 39 Section 1208 (b) action

and are not germane to the back pay award. Rather, the remedy in this matter appears to be governed by Bowen v. United States Postal Service, 459 US 212 (1983).

II. Plaintiff's Back Pay Award is Not Governed by ELM Section 436

Defendant U S Postal Service asserts its defense and motion for summary judgment based on its erroneous assertion that the back pay owed to Plaintiff is governed by a "1990 version of the Employee Labor Relations Manuel, Section 436 therein. This is incorrect.
There are a series of cases issued by the Merit System Protection Board which have decided that the Back Pay Act, not ELM 436, is the governing method of effectuating compliance with back pay awards owed to a veteran preference eligible employee (such as Plaintiff) of the Postal Service. See **Davis v. U.S. Postal Service and Office of Personnel Management** 64 MSPR 652 (1994); also **Timberblake v. United States Postal Service**, 79 MSPR 520 (1998), **Green v. U S Postal Service**, 67 MSPR 62 (1995).

It should be mentioned that the Back Pay Act, 5 USC 5596, "applies to any case in which back pay is due to unjustified personnel action, to an employee of an agency, who on timely appeal or an administrative decision

(including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation or collective bargaining agreement, to have been affected by an

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1 It should be mention that the United States Postal Service has acted in bad faith in its reliance on this attachment A to Beda Velasquez sworn statement. The ELM has undergone several revisions since 1989 and 1990, the most recent being ELM 13, which issued in June 1998. Furthermore, there have been several manual updates and Postal

unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of all part of the pay, allowances, or differentials of the employee-" See Exhibit 1 hereto. The Merit System Protection Board has interpreted the Back Pay Act and its regulations as to affording all veteran preference eligible employees that their claims will be governed by the latter, not the ELM 436. See also **Exhibit 2, Back Pay Act, 5 CRF 550.801-808.**

III. Plaintiff Is Owed Additional Back Pay and Interest

Plaintiff has set forth in his sworn statement numerous reasons for which he has not been properly paid back pay or the interest thereon. In this regard, the PS Form 8039 mandates the agency to use the Plaintiff's last thirteen pay periods as the basis for payment of what is owed to him. Plaintiff was a PTF (Part Time Flexible Window Clerk) immediately prior to his unlawful discharge. However, the true overtime, which Plaintiff worked, of almost 12 hours daily does not appear in these computations nor does it

included calculations for premium overtime nor night differential. Rather, Defendant U S Postal Service used the hours of another atypical employee, Juan Rodriguez, in lieu of using the proscribed method. The amount of back pay

owed to Plaintiff must be recalculated to reflect all his entitlements.[3]

The interest rates used by the defendant are also in error. First, the computation did not use the proscribed percentage rate under the Back Pay Act, which is the IRS rate proscribed in 26 U SC 6621 (a) (1). See Exhibit 3 hereto. Rather, it used the Federal Judgment rate (See Exhibit 4 hereto). Another discrepancy is that the interest was computed on a 28-day cycle rather than the statutory daily compounding of interest. This

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Bulletins issued since 1996 regarding back pay, including changes mandated by case law such as Davis v. U S Postal Service, 64 MSPR 652 (1994) AND OTHERS.

2. There is specific mention of arbitrator's decision in binding arbitration. It is undisputed that this the case at hand.

resulted in the Plaintiff receiving less than 50% of what is owed in interest on his back pay. Other items, which Plaintiff does not know if there has been compliance, are holiday pay, annual and sick leave credits, etc. See **Gannon v. U S Postal Service**, 67 MSPR 660 (1995 also **Bradley v. U S Postal Service**, 79 MSPR 110 (1998)

In sum, it is necessary that an order issue ordering the Defendants to make whole Plaintiff in accordance with his rights as for veteran preference eligible employee and that

his back pay and interest be correctly calculated. The Agency should also be ordered to furnish its computations of both back pay and interest to the Plaintiff in order for him to be able to ascertain the correctness of the same.

IV. Plaintiff Had No Duty To Mitigate Damages

The first reason for Plaintiff not having to mitigate damages (back pay) is that the arbitration award was clear on its terms, it awarded full back pay. This award was not appealed by the defendant U S Postal Service and it became final and binding on the agency. The arbitration award, provided, quote, " The grievant (Plaintiff) shall be reinstated to the U S Postal Service with full seniority and full back pay, and all other benefits and entitlements." my emphasis. The award was clear on its terms. The U S Postal Service failed to raise any issues of mitigation of damages during the arbitration and it knew what was at stake, back pay and reinstatement to his former position. Yet the agency did not appeal this decision. The agency is now barred from doing so. See **International Union of Operating Engineers, Local No. 841 v. Murphy Company**, U S Cir. Ct. Appeals, 7th Cir., No. 95-2608, decided April 30, 1996. This same result was

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3. Plaintiff is unable to calculate the correct back pay since the defendant did not furnish him with copies of how it made the computations of his back pay

found in an EEO case, **Quiñones-Candelario v. U S Postal Service,** 50 Fair Employment Practices Case, pages 303-304 (Judge Pieras, U S District Court for Puerto Rico, 1989).

Secondly, the parties are aware that a veteran's preference eligible employee such as plaintiff, is entitled to back pay as governed by the Back Pay Act of 1966 and not by the Postal Service regulations (ELM 436). Furthermore,

plaintiff and other veteran preference eligible employees have no obligation to mitigate damages nor does he/she have a duty to seek alternate employment during the period he/she was illegally removed from his/her employment. This was discussed between the undersigned and U S Attorney Fidel Servillano in a February 1999 meeting and he agreed this the state of the law.

It is undisputed that Plaintiff is a veteran preference eligible employee and the defendant, U S Postal Service, has recognized him as such. See sworn statement of the Plaintiff at paragraph 3. This was also established at the arbitration hearing. See Attachment A to Second Amended Complaint, at page 29. As a veteran preference eligible employee, during the appeal of his unlawful removal, Plaintiff was not required by law to be employed elsewhere. See **Andress v. U S Postal Service,** 56 MSPR 501, at 505, 507-509. This stems from the Veteran's Preference Act of 1944, later amended by the Back Pay Act of 1966, as discussed in **Davis v. U S Postal Service**, supra.

Likewise, it is untrue that there was a windfall to Plaintiff in the amount of $2221.63. This is incorrect. First of all, Plaintiff had not duty to discount salaries earned while illegally removed from the Postal Service. This is because full back pay was awarded. The arbitrator did not award full back pay less interim earnings. There is a collateral estoppel to make this claim now. Secondly, as a preference eligible employee

had no duty to work while appealing his illegal removal. This was decided by MSPB in numerous cases. Finally, the Plaintiff incurred in expenses necessary to procure the employment. These expenses offset his earnings of $2221.63 . It has also been determined that unemployment benefits are not deductible from a back pay award. See **Margolin v. U.S.** 75 Ct. Cl. 768 (1966).

V. Plaintiff Is Due Attorney Fees (Damages) From The US Postal Service

It is apparent that the U S Postal Service officials acting on behalf of the agency acted in bad faith from at least July 20, 1998 forward. They stifled all attempts by Plaintiff to obtain his back pay by:

(a) Requesting Plaintiff to sign a blank check (Form PS 8039) in February 1998.
(b) Supplying Plaintiff with an incomplete form PS 8039 about August 31, 1998 and giving him instructions to sign it in blank after he had requested the form be supplied with the information indicated in the instructions thereon (See Attachment C to sworn statement of Plaintiff
(c) Not answering Plaintiff s letter of October 17, 1998 (Attachment D).
(d) Not preparing back pay settlement sheet (PS Form 8039) until April 1999, some 9 months later, and even then, preparing its incorrectly (Attachment E)
(e) Not paying the back pay and interest owed to Plaintiff under the law even in June 1999, nor making good faith efforts to correct its determinations since June 1999.
(f) By using the ELM 436 method of computing back pay in lieu of legal precedent and directives of the agency to use the Back Pay Act and Subpart H of regulation 5 CFR 550 et seq. to compute back pay for Plaintiff knowing the latter is a veteran preference eligible employee.

The agency argues that it owes no attorney fees to Plaintiff. This is untrue. The Plaintiff had to file this action due to the agency's refusal and reluctance to comply and also due to the fact that enforcement of the award would be time barred if he did not act within 6 months after

the defendant labor union failed to duly represent him due to arbitrary, discriminatory, perfunctory and invidious reasons. It is a fact that the Plaintiff did not get the cooperation from the Union, who suggested that plaintiff sign the "blank check" and told plaintiff that it did not have money to enforce the award. See Exhibits 3. Plaintiff at least was lead to believe that the Union and the U S Postal Service were acting together regarding the non-payment of his back pay. See pages of deposition answers, pages 25 to 38, page 79. Exhibit # 5.

In any event, should there not be proven joint and several liability, there should be imposed liability on the U S Postal Service for attorney fees due to its bad faith acts and negligent handling of the back pay awarded to Plaintiff. See Bowen v. United States Postal Service, 459 U S 212, supra Vaca v. Sipes, 386 U S 171 (1967). In Bowen, the court approved a splitting of this assessment by jury of the responsibility of each party.

VI. CONCLUSIONS

For the reasons stated above, Plaintiff has not been compensated in accordance with the law and enforcement of the back pay award should be granted. Likewise, attorney fees and costs should accrue to Plaintiff, who has been the victim of inaction by the labor union and by bad faith dealing and reluctance to comply by the U S Postal Service.

Respectfully submitted this 25 of September 2000.

Harold E. Hopkins Jr., Esq.
USD 126501 #84
Mayaguez Street
Urb. Perez Morris
Hato Rey, Puerto Rico 00918

Tel. (787) 281-7134
Fax (787) 765-6932

-7-

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Luis A. Suarez,
An Individual

Plaintiff

vs

United States of America and
United States Postal Service,
William J. Henderson,
Postmaster General, Employer

Civil No. 98-1854 CC
Action to Enforce
Arbitration And
Damages, Back Pay,
Jury Trial

and
American Postal Workers Union,
Caribbean Area Local, dba P.R.
Area Local, Local 1070,a Union, et al

Defendants

Sworn Statement of Luis A. Suarez, Plaintiff

I, Luis A. Suarez, pursuant to the provisions of 28 U S Code § 1 746, declare under the penalty of perjury as follows:

1. I am the plaintiff in the above entitled action and last employed by the United States Postal Service at Rio Grande, Puerto Rico, the last position assigned to me being a window distribution clerk

2. I am a member of the American Postal Workers Union, Puerto Rico Area Local, Local
1070.

3. I am a veteran preference eligible employee with 30 % disability and I have a 10-point veteran. See Exhibit A hereto.

4. About November 26, 1997, I was awarded reinstatement and full back pay by Arbitrator Joseph S. Cannavo Jr., after having been illegally removed from my employment with the United States Postal Service on March 31, 1997.

5. During December 1997 and January 1998, I made several attempts to have the United States Postal Service comply with the award and to pay me the back pay owed to me.

6. On February 12, 1998, Juan Torres, my supervisor called me to the office and he then gave me Forms PS-8038, Torres asked me to fill-out these forms. While I was not in agreement with these forms, PS-8038, since first of all, there had been no allegations of a lack of mitigation raised by the United States Postal Service during the arbitration, and secondly, these forms were inapplicable to me due to my being a veteran preference eligible employee. However, despite my protesting verbally and later in writing, I did complete the Form PS-8038, however I did not immediately give them to Juan Torres since during this same period of

time, on February 17, 1998, Juan Torres and I also discussed the Forms PS-8039, infra at paragraph 10 herein.

7. About February 17, 1998, Sandra Moya, an employee from Human Resources, came to Rio Grande Post Office, and I met with her alone in the Postmaster's office. She handed me PS Forms 8039, Back Pay Decision/Settlement Worksheet. The Forms PS 8039 handed to me by Ms. Moya were in blank except for the heading on page 1. Items 1, 2, 3a, 4, 6, 7, 9a and 10a were filled out. On pages two and three nothing was filled out. Sandra Moya requested me to sign and date the Form PS 8039 on page three at item H thereon. See Exhibit B (sample).

8. I reviewed the form 8039 and read the instructions which said
"**Instructions:** The applicable sections of this form, depending on the method used (see ELM 436) must be completely filled out before Minneapolis Accounting Service Center (ASC) can process the back pay claim. The employee must review and agree to the information provided on this form before it can be submitted to the Accounting Service Center (ACS). "

9. I then told Sandra Moya I could not sign this document because there was information missing and incomplete and not filled-out. I told Sandra Moya that before I could sign the

Forms 8039, I needed the information on the back pay computation to be filled out as well as other items. I handed the Forms 8039 back to her and requested that they be completed and returned tome for my review and signature.

Sandra Moya then told me to get Juan Torres and I did so. I went back to work.

10. Shortly thereafter, Juan Torres, supervisor, called me to the office and we discussed the
Forms PS-8039, which Sandra Moya had given to Torres. Although Torres tried to get me to sign the Forms PS-8039

in blank, I did not agree. I again told Torres that I would sign the Forms 8039 when they were completed and filled-out as per the instructions, and if in agreement with the information, I would then sign them. Torres told me that it would take weeks to fill out the Form PS 8039 and I should sign it as it was and get you paid. I did not sign it in blank because this would be equivalent to signing a blank check to the United States Postal Service.

11. After waiting several weeks without receiving the Forms 8039 from the United States Postal Service, I approached Juan Torres about the first week of July 1998 and again asked him about my back pay. I was told by Torres that according to Beda Velazquez that due to the fact my Form 8038, Employee Statement to Recover Back Pay was missing, that I could not be paid.

12. About July 20, 1998 I tendered to Juan Torres the Form 8038. Employee Statement to
Recover Back Pay together with my letter of that same date. I indicated to Torres that although I had filled out the Form PS 8038 previously however I was still waiting for him and the United States Postal Service to send me the completed Forms PS 8039, which I had requested from Sandra Moya and Juan Torres in February 1998.

13. The statement made by Beda Velazquez at page 2 thereof, items 12 and 13 are incorrect.

14. In this regard, Velazquez did not send me Forms PS 8039 Back Pay Decision/Settlement

Worksheet until August 31, 1998 as per postmark on the envelope. I received this letter about September 1 or 2,

1998. In the envelope I received, there was a page one, which was partially filled out and two page three, which were in blank with no data, and there was no page two. I include a photocopy hereto of what I received about September 1 as Exhibit C hereto.

15. Due to the hurricanes which passed through Puerto Rico in September 1998, I was unable to reply to Ms. Velazquez immediately. On October 17, 1998, I sent to her a letter in which I again requested that she respond to my request for the completed PS Forms 8039 Back Pay Decision/Settlement Worksheet properly filled out so that I could sign it and authorize that my back pay could be processed. See Exhibit D hereto.

16. The United States Postal Service did not answer my letter of October 17, 1998 until April 1999. This response came after a meeting held with my attorney, Harold E. Hopkins Jr. and U S Attorney Fidel Servillano in February 1999.

17. In April 1999, I received the Form PS 8039 with the Section G, Hours Tabulation filled-out. See Exhibit E hereto.

18. I did not sign the Forms PS 8039 tendered to me in April 1999 for the following reasons.

(a) I was not properly reinstated to my position status quo antes.

(b) The hours tabulation did not include my hours with overtime for 13 pay periods prior to my illegal removal as a PTF.

(c) In the alternative, the hours tabulation used for co-worker Juan Rodriguez isincorrect since about 10 other individuals in addition to Rodriguez performed mywork in lieu of said person. Also Rodriguez's hours are not typical to

what I would have worked, which is 12 hours per day for 6 days per week.

(d) No sick leave nor annual leave was calculated nor restored to the best of my knowledge.

(e) The premium overtime calculations are missing as well as night differential pay, which is owed to Suarez who would have been entitled to these.

(f) The contract agreement increases and step increases have not been incorporated in the computations.

19. My attorney of record informed Beda Velazquez of these discrepancies and she decided to send the Forms PS-8039 for payment without my signature.

20. In or about June 26, 1999, I received a check for back pay and another check for interest owed on my back pay. Together there were statements of how the interest was calculated.

21. The interest paid to me is incorrect since the interest percentage rate used is not the correct rate1 nor was the interest compounded daily, which is the proper method to be used to calculate the interest owed to me under the Back Pay Act of 1996, as amended, as a veteran preference eligible employee.

22. There was no overpayment made to me as alleged in bad faith by Beda Velazquez, rather I still am owed monies by the United States Postal Service due to my being illegally removed from my position as PTF Window Clerk on March 31, 1997.

23. I request that an order issue ordering the United States Postal Service to comply with the arbitration award and to pay me the correct amounts owed under the law.

I AFFIRM UNDER SOLEMN OATH AND PURSUANT TO THE PROVISIONS OF 28 U S CODE § 1746, I DO DECLARE UNDER THE PENALTY OF PERJURY THAT THE FACTS AND INFORMATION CONTAINED IN THIS STATEMENT ARE TRUE AND CORRECT TO THE BEST OF MY BELIEF AND KNOWLEDGE.

At San Juan, Puerto Rico this 25th day of September 2000.

"S/ Luis A. Suarez "

1.Under the Back Pay Act, interest is the overpayment rate established under 26 USC 6616.